SEP 19
MICHAEL RODAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-3011

PAUL C. WASHBURN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ENTRY OF APPEARANCE

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Paul C. Washburn, hereby petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit affirming, per curiam, without opinion, the Order of the District Court denying Petitioner's motion for new trial on the grounds of newly discovered evidence. Petitioner was convicted of preparing a false and fradulent income tax return for the year 1968 on behalf of a married couple both of whom testified that she did not consent to the return. Petitioner subsequently discovered that at time

of trial and testimony of both Mr. and Mrs. McLean, taxpayers, they had executed a formal agreement to file joint returns, including year 1968, which showed that their testimony was false. Petitioner filed a Motion for New Trial and Judgment of Acquittal to the District Court. (Appendix II) The District Court found that the new evidence was immaterial and the decision below was affirmed by the Court of Appeals.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated August 20, 1974, is not yet reported but appears in Appendix V. The District Court Order affirmed by the Court of Appeals appears in Appendix IV.

JURISDICTION

The decision sought to be reviewed in this case was entered by the United States Court of Appeals for the Fifth Circuit on August 20, 1974. No petition for rehearing was filed. The statutory provision believed to confer jurisdiction on this Court to review the judgment or decree in question is 28 USC 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court erred in denying Petitioner's Motion for New Trial and Judgment of Acquittal on the grounds that the newly discovered evidence was immaterial. The finding was predicated upon the following errors: (1) An erroneous assumption of law that an estranged married couple is not entitled to file a joint return; (2) An erroneous assumption of law that a married couple may not agree to file jointly after the due date

of the return; (3) That the indictment did not charge Petitioner with knowledge that taxpayers were not eligible to file jointly because he knew they were estranged; and (4) That evidence was not introduced at trial to show that Petitioner knew taxpayers were ineligible to file jointly because he knew they were estranged.

2. Whether a criminal conviction is in violation of due process, requiring a new trial, when it is subsequently discovered that testimony given at trial is tainted or false; the falsity being that both Mr. and Mrs. McLean testified at trial that she did not consent to the 1968 joint return at a time when both had executed a formal agreement to file joint returns for all open years including the year 1968.

STATEMENT OF THE CASE

1. Petitioner, Paul C. Washburn, was indicted by the Grand Jury in West Palm Beach, Florida on February 22, 1973. The five count indictment charged Petitioner with violating 26 USCA 7206(2). Each count of the indictment charged Petitioner with aiding and assisting in the preparation and presentation of fraudulent tax returns for the years 1966, 1967, 1968, and 1969. Count IV of the indictment dealt with an amended tax return filed for the year 1968. The trial was held starting on June 4, 1973, and lasting for two days. At the conclusion of the Government's case, the court granted Petitioner's Motion for Judgment of Acquittal as to counts III and V of the indictment, denying the Motion for Judgment of Acquittal as to counts I, II and IV. The case was submitted to the jury on June 6, 1973, and they returned a verdict of not guilty as to counts I and II and a verdict of guilty as to count IV. The trial court adjudi-

cated Petitioner guilty as to count IV of the indictment. Petitioner moved for a new trial on June 11, 1973, on the basis of the insufficiency of the evidence. The court denied the Motion for New Trial on June 26, 1973. Petitioner was sentenced on July 12, 1973. The court imposed a split sentence of eighteen months requiring Petitioner to serve sixty days and thereafter be placed on probation for a period of two years. Additionally, the court imposed a fine of $2,500.00. Notice of Appeal was filed and a superseadas bond was granted on July 13, 1973.

2. While this Appeal was pending, Petitioner discovered certain evidence not introduced at trial (Appendix III-29 and on September 28, 1973, he then filed a second Motion for New Trial and Judgment of Acquittal. The District Court denied the Motion on December 6, 1973, on the grounds that it did not have jurisdiction while the case was on appeal. Petitioner appealed this Order on December 15, 1973. The Court of Appeals then affirmed the first appeal *(United States v. Paul C. Washburn* (CA5, 1973) 488 F.2d 132, and Petitioner filed a motion to dismiss the December 15, 1973, notice of appeal, which motion was granted by the District Court on February 14, 1974.

3. Petitioner refiled the Motion for New Trial and Judgment of Acquittal on December 19, 1973, since the first appeal was no longer pending. This motion and memorandum of law in support thereof appear in Appendix II and III. In summary, the motion and memorandum pointed out that although it was alleged that Petitioner prepared and filed a joint income tax return on behalf of Edward and Manuela McLean (hereinafter referred to as Husband and Wife), a married couple, under power of attorney given by Husband alone, and that despite the

fact that the Wife did not sign either the return nor a power of attorney; she did give her tacit consent thereto. Therefore, the return is a true return, not false, exonerating Petitioner of guilt of commission of a crime under IRC 7206(2). The elements of the crime are a showing of both a false return and fraud; the absence of one negates the crime. Appendix III-1 to 12. Petitioner, however, was found guilty principally on testimony given by both Husband and Wife that she did not consent to the 1968 amended return referred to in Count IV in the indictment. Petitioner's Motion for New Trial was based on a newly discovered formal agreement executed by both Edward and Manuela McLean whereby they agreed to file joint returns for all open years including 1968. This agreement was executed three days before trial and directly contradicted testimony of both taxpayers indicating that the testimony was false. Petitioner alleged that taxpayers' testimony misled the jury and the new evidence was so material that it would have probably produced a different verdict if presented to the jury. Petitioner's conviction could not have been sustained without this testimony. Appendix II. In addition to showing that the 1968 return was not false, Petitioner also showed that it was not fraudulent. The element of "willful" was wanting in that Petitioner had not deceived the Internal Revenue Service into believing that the Wife had signed the return or power of attorney. The power of attorney lacking Wife's signature was attached to the return as filed. Petitioner believed he had authority to prepare the return based upon good faith reliance on representations made by taxpayer and his attorneys to Petitioner. The most that was shown was that Petitioner made a bona fide mistake of fact or law which is a defense to the crime. Appendix III-12-27.

4. The District Court denied Petitioner's motion on February 14, 1974. Appendix IV.

5. Petitioner appealed the District Court Order to the United States Court of Appeals for the Fifth Circuit. That Court affirmed the lower court, per curiam, on August 20, 1974. Appendix V. It is from this decision that Petitioner files this petition for Writ of Certiorari.

STATEMENT OF FACTS

Petitioner is a preparer of tax returns. Under authority of a power of attorney executed by Edward McLean, Petitioner on May 15, 1969, prepared and filed a joint income tax return for the year 1968, on behalf of Edward and Manuela McLean, a married couple. Wife did not sign the power of attorney nor the return. Petitioner attached a copy of the power of attorney to the return and filed it with the Internal Revenue Service. At the time, Husband and Wife were not living together. Although Wife knew and acquiesced to this return, her accountant, contrary to law, in October of 1969, filed a separate return on her behalf for the same year. On January 18, 1971, Petitioner amended the 1968 joint return to include the income and expenses of the Wife, not previously reported, and refiled this corrected return on January 18, 1971, within the allowed time period.

On July 7, 1969, subsequent to filing the original return, but prior to filing the amended return, Wife's accountant wrote a letter to Petitioner asking for a copy of the joint return as filed and a copy of the proposed amended return. Upon receiving the requested information he forwarded copies to the Wife. In this letter the accountant stated that it did not give Petitioner authority

to file a joint return even though at that time he acknowledged that it had already been filed.

Husband and Wife were estranged and negotiating a property settlement pursuant to a divorce. Husband had substantial income and the Wife losses. Both were desirous of filing a joint return as tax savings were substantial, but Wife insisted that she receive one-half of the tax savings from the Husband as a condition to her signing the return. At the trial, both Husband and Wife testified that there was no agreement between them to file a joint return for the year in question. The jury found Petitioner guilty of the crime of preparing and presenting a false and fraudulent amended tax return for the year ending 1968 on behalf of his clients under 26 USCA 7206(2) in that he elected the filing status married, filing jointly. There was no contest concerning any other information included therein.

Approximately two months after trial, Petitioner did learn from Husband's attorney that Husband and Wife, pursuant to a divorce, had filed with the Circuit Court for Palm Beach County, Florida, an agreement to file joint income tax returns for all years for which such returns are authorized including the year 1968. This agreement was filed on Thursday, May 31, 1973, at 4:30 P.M. Appendix III-33. Petitioner's trial commenced on Monday, June 4, 1973. Both Husband and Wife, at trial, testified that she had not agreed to file a joint return for 1968 and at the time they were making these statements under oath, a written agreement between them to do so had already been executed and filed in court. Upon discovery, Petitioner filed a Motion for New Trial and Judgment of Acquittal. Appendix II. The Motion was predicated on newly discovered evidence under Rule 33, Federal Rules

of Criminal Procedure. Petitioner alleged that the new evidence was so material that if it had been presented to the jury, in all likelihood, there would have been a different verdict, since the Government's case was predicated on the fact that Wife had not given consent to the amended 1968 return.

POINT I

THE QUESTION INVOLVED IS AN IMPORTANT ISSUE OF FEDERAL LAW, WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

The District Court denying Petitioner's Motion for New Trial on the grounds of newly discovered evidence states: "Specifically, the indictment charged Washburn (Petitioner) with preparing a fraudulent amended joint return for the tax year 1968 for Edward and Manuela McLean, at a time when Washburn knew Edward McLean was estranged from his wife and not entitled to file a joint return. . . . This evidence is in the form of a written stipulation between Edward and Manuela McLean, incident to divorce, whereby the wife agreed to the filing of joint amended returns for all "open years", including 1968. . . . The stipulation is immaterial to Washburn's conviction. It was entered into more than two years after Washburn prepared and filed the fraudulent return. The fact that the McLeans subsequently agreed to file a joint return does not make the earlier joint return prepared by Washburn any less fraudulent." Appendix IV. Therefore, the lower court held that the newly discovered evidence was immaterial for the reasons that: (1) Petitioner knew at the time of filing the alleged fraudulent return that taxpayer was estranged from his wife and, therefore, he

knew they were not eligible to file joint returns, and (2) that a husband and wife may not agree to file jointly subsequent to the due date of the return. The errors of law in this Order are as follows:

1. The lower court's legal conclusion that an estranged married couple is not entitled to file a joint return is contrary to law. The only requisite to making the election to file jointly is that the couple be married. IRC 6013(d), IRC Reg. 1-6013-4(a). Furthermore, a husband and wife separated under an interlocutory decree of divorce retain the status of being married until the decree becomes final and are entitled to file jointly. 8A Mertens, *Law of Federal Income Taxation*, Sec. 47.05; Rev.-Rul. 57-365, 1957-2 C.B. 896. In the case at bar, Husband and Wife had not even reached this stage of the divorce but were merely not living together at the time of filing the return. Therefore, it is clear that the lower court's decision is predicated upon an erroneous conclusion of the law in that it found the newly discovered evidence immaterial as Petitioner knew at the time of filing the alleged fraudulent return, taxpayer was estranged from his wife and not eligible to file jointly. If this were true, the lower court's ruling would be correct. However, the legal conclusion that estranged taxpayers are not eligible to file jointly is contrary to law.

2. The lower court likewise erred when it stated that the agreement to file jointly between taxpayers more than two years after the alleged fraudulent return was filed by Petitioner does not make the return any the less fraudulent. A husband and wife may elect to file joint returns after filing separately within three years after the date due of the return. IRC 6013(b). IRC Reg. 1-6013-2. Notwithstanding the fact that a spouse has not signed a

joint return, she may give her tacit consent to it on or after filing. 8A Mertens, *Law of Federal Income Taxation*, Sec. 47.09; *Mathew L. Ladden* 38 T.C. 530, dismissed 3rd Cir., 1963; *Muriel Heim* (C.A. 8, 1958) 251 F.2d 44. Petitioner was convicted of filing a false and fraudulent return under IRC 7206(2). If taxpayers subsequently agreed to file jointly within the confines of the law then the return filed by Petitioner is not false and fraudulent but a true and correct return since the allegations of the indictment and proof at trial were restricted to the question of the ability of taxpayers to file jointly. Therefore since the law makes provision for filing jointly after due date; the lower court's conclusion, that an agreement between taxpayers to file jointly more than two years after the return was filed by Petitioner is immaterial, is contrary to law.

Furthermore, whether or not a husband and wife may agree to file jointly more than two years after the return does not go to the question of fraud. Fraud carries with it the element of "willful" which denotes an act that is intentional, knowing and voluntary with an evil motive or bad purpose. *United States v. Murdock*, 55 S.Ct. 223 (1933), *Spies v. United States*, 317 U.S. 492 (1943). See also discussion in Appendix III-12-15. The criminal act refers to Petitioner or the one so charged with the crime. The act of subsequent agreeing to file joint returns pertains to Husband and Wife. Their action does not go to the question of Petitioner's fraud. Thus, the holding by the lower court, that a later agreement by Husband and Wife does not make the earlier return less fraudulent, is specious. There is no relationship between Petitioner's act and taxpayers' act.

3. Petitioner was found guilty under Count IV of the indictment. The lower court stated that this indictment charged Petitioner with preparing a fraudulent joint return for taxpayers at a time when he knew they were estranged and not entitled to file jointly. This statement is incorrect. Count IV does not so charge Petitioner. Appendix I-3.

4. Referring to paragraph 3 above, which includes the erroneous statement by the lower court as to the charge, likewise no proof nor evidence was introduced at trial which would show that Petitioner knew taxpayers were ineligible to file jointly because they were estranged. See transcript of testimony.

These four errors are not harmless errors. Petitioner was found guilty under Count IV of the indictment on the grounds that taxpayer's wife had neither signed the return nor the power of attorney and that she otherwise had not given her consent thereto. Petitioner made the point of law to the lower court, in his Motion for New Trial and Judgment of Acquittal and the Memorandum of Law in support thereof, that the taxpayer's spouse in fact had given her tacit consent to both the original and amended 1968 joint return, that the amended 1968 return in question in Count IV was in fact a true return and, therefore, Petitioner had committed no crime under IRC 7206(2). Appendices II and III.

The newly discovered evidence consisted of a formal agreement between Husband and Wife to file joint returns for 1968 and other years, executed three days prior to trial, at which both Husband and Wife testified that she did not give her consent to the alleged fraudulent

return Appendix III-29. Petitioner pointed out to the court that the new evidence was so material that had it been submitted to the jury, the jury in all likelihood would have produced a different verdict. Appendix II-2. But the lower court found this later discovered formal consent between the taxpayers to be immaterial. It did so on the erroneous conclusion of law that this consent would not make the 1968 return less fraudulent. It likewise did so on the erroneous conclusion of law that since taxpayers were estranged they were not eligible to file joint returns anyway. The lower court further concluded that Petitioner was indicted on the grounds that he knew of this error of law, and the indictment did not so charge him with this knowledge nor did proof at trial support this conclusion.

Grounds for a reversal of a lower court ruling that newly discovered evidence is immaterial are where it is shown such ruling is predicated upon errors of law or where such ruling constitutes an abuse of the court's discretion. *United States v. Johnson,* 90 L.Ed. 562 (1945); *Remmer v. United States,* 76 S.Ct. 425 (1956); *Gage v. United States,* (CA 9, 1948) 167 F.2d 122; Wright, *Federal Practice and Procedure,* 2d Ed., Sec. 599. Petitioner's conviction was sustained on testimony of both Husband and Wife that she did not give consent to the return. The question of consent is crucial to Petitioner's innocence or guilt. Newly discovered evidence directly relating to this question is not immaterial; it showed the testimony to be false. The lower court's finding (sustained by the Court of Appeals) predicated upon errors of law is ground for reversal. Petitioner has been denied his right to a fair trial.

POINT II

THE BASIS OF THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS IN CONFLICT WITH THE DECISIONS BY THE UNITED STATES SUPREME COURT AND BY THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND NINTH CIRCUITS.

The District Court, after finding the newly discovered evidence immaterial, predicated upon erroneous legal assumptions, then stated that "the only other conceivable use" of the evidence was to show that Wife did not give her consent; a conclusion contrary to findings of the jury and the Court of Appeals. Furthermore, the court continued, evidence that is merely impeaching does not warrant a new trial under Rule 33, Federal Rules of Criminal Procedure. Appendix IV-2 and 3. Therefore, the legal conclusions of the District Court as stated in its Order are: (1) If a jury found defendant guilty on sufficient evidence at trial and a later discovery reveals that this evidence is false, if there is other evidence to sustain the conviction, there is no grounds for a new trial; (2) If newly discovered evidence shows that a witness was committing perjury or his testimony was false, such new evidence is merely impeaching and not grounds for a new trial. Both conclusions are unsupportive in the law and in contradiction to the cases handed down by this Court and other appeal courts.

The issue in the case at bar is whether or not Mrs. McLean gave her consent to the 1968 joint tax return. Transcript, pages 393, 394-Court Instructions to the Jury. The key government witnesses, Husband and Wife, on

numerous occasions testified that she did not consent to file jointly. Transcript, pages 34, 67, 69, 70, 75. Petitioner's trial attorney, on cross examination of Wife, made efforts to elicit from Wife that she either directly or indirectly agreed to file a joint return for 1968 and she either stated unequivocally that there was no agreement or she was devious in her replies. Transcript, pages 74-77. Examples of this testimony are as follows:

To Husband—Transcript, page 34.

> Q. Did you ever agree on the terms under which you and Manuela McLean would file jointly?
> A. No, sir, not to my knowledge.
> Q. Is it your understanding that she refused to sign jointly with you?
> A. Yes.

To Wife—Transcript, pages 75, 76, 77.

> . . .
> Q. Then, as far as you know, you and your husband were both entitled to the status of married, filing a joint return, for the year 1968, is that correct?
> A. No, we never came to an agreement. I filed my own.
> . . .
> Q. Why didn't you file a joint return?
> A. Because we had asked for a certified check for one-half of the moneys and since we had to file . . .
> . . .
> Q. Isn't it true Ma'am, that your accountant has recently contacted Mr. Washburn's office in order to try to obtain records whereby you can still file an amended return for 1968? Do you have any knowledge of that?

A. I have no knowledge.
Q. You don't know?
A. Would you rephrase that question or repeat it?
Q. (repeat)
A. Isn't 1968 finished and over? . . . You can't —the law or whatever you call it on that is finished, isn't that right?
Q. I don't know.
A. I think so. I don't think there would be any reason to discuss it.

Therefore, both Husband and Wife testified unequivocally that she never agreed to file a joint return for 1968. When Petitioner's attorney questioned Wife on her efforts to obtain tax records at time of trial to enable her to file an amended 1968 return, she refused to answer the question. It is reasonable to conclude that without this testimony of Husband and Wife, Petitioner would not have been convicted; and yet four days prior to giving this testimony both Husband and Wife had executed an agreement to file joint returns including year 1968. Appendix III-29. This agreement was not discovered nor discoverable at trial. Appendix II-4. Petitioner filed his Motion for New Trial on the basis that such evidence was not merely cumulative or impeaching in character, that if it had been presented to a jury it would probably have reached a different verdict. Appendix II.

Since the contents of the agreement showed that the testimony given by Husband and Wife was false, the first question is whether such newly discovered evidence is merely impeaching as alleged by the lower court? The United States Supreme Court, in a case similar to Petitioner's in that defendant was convicted of violat-

ing the Smith Act on tainted testimony, stated that this is not a question of merely cumulative or impeaching evidence under Rule 33, Federal Rules of Criminal Procedure. "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord Petitioner a new trial." *Mesarosh v. United States,* 77 S.Ct. 1, 5 (1966).

The lower court also stated that the only other use of this newly discovered agreement would be for the purpose of showing that the 1968 return was prepared with consent of Mrs. McLean. The court continued by stating that the evidence at trial does not support the finding of consent and this finding was upheld on appeal. Appendix II-4. As previously indicated the only issue in this case is whether or not Mrs. McLean gave her consent to this return, and Petitioner asserts that this is his only purpose of now producing this evidence. In Petitioner's Memorandum of Law he shows that she gave tacit consent to this return but her signature was conditioned on receiving one-half of the tax savings in advance from her estranged husband. As Petitioner indicated, Federal law of joint returns makes no provision for conditional consent and, therefore, the condition must be ignored. Furthermore, Wife's condition went to her signature not to her consent. Petitioner also indicated that the execution of this agreement by both Husband and Wife supports his position that she did give her consent. Appendix III-11. In its Order, the lower court stated the evidence introduced at trial indicates Mrs. McLean did not give her consent and the sufficiency of the evidence was upheld on appeal. Appendix IV-3. But the lower court's reasoning is spurious for the

evidence introduced at trial does not include the newly discovered consent agreement which shows the testimony of both Mr. and Mrs. McLean to be false.

Therefore, the second question is: If the jury's original verdict can be sustained on other evidence, is subsequent discovery that testimony given was false, grounds for a new trial? Petitioner contends that any conviction sustained on tainted testimony is in violation of the United States Constitution. "A lie is a lie, no matter what the subject, and, if it is in anyway relevant to the case, the Court of Appeals has the duty to correct it . . ." *Napue v. Illinois,* 79 S.Ct. 1173, 1177 (1958). The Supreme Court continued by stating that false evidence known to be false must fall under the Fourteenth Amendment, and the fact that there are other grounds for believing a witness does not turn an otherwise tainted trial into a fair one. *Napue v. Illinois,* supra. Chief Justice Berger in a later case echoing *Napue's* conclusion that deliberately presenting false testimony is in violation of due process and stating the standard for granting a new trial said that: "A new trial is required if the false testimony could in *any reasonable likelihood* (emphasis supplied) have affected the judgment of the jury." *Giglio v. United States,* 92 S.Ct. 763, 766 (1972). In both cases the witness had lied on the stand that the prosecutor had not promised him leniency. Therefore, false testimony knowingly given, is in violation of due process and grounds for a new trial.

Does due process become an issue only when the prosecution knows of the fabrication? This question was entertained by Justice Friendly in *Kyle v. United States,* (CA 2, 1961) 297 F.2d 507, cert. denied, where the

most that could be shown was that the government prosecutors were negligent. The newly discovered evidence consisted of letters negligently suppressed. The court ordered a new trial notwithstanding the case against Defendant was "crushing". Relying on *Napue* and *Mesarosh*, the court found that the prosecution's conduct transgressed the principles of fair play. So continued the court: "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach." *Kyle v. United States*, supra at 514.

Petitioner avers that it is not necessary to show (1) that testimony given was perjured, (2) that the prosecutor knew that it was perjured or (3) even that the prosecutor was negligent. Any conviction based on tainted testimony, whether or not known by the prosecutor, is in violation of due process and grounds for a new trial. Due process under both the Fifth and Fourteenth Amendments have their origin in the common law and Chapter 29, Magna Charta which states in part that . . . "No freeman shall be . . . imprisoned . . . or outlawed but by the lawful judgment of his peers or by the law of the land." 16 Am. Jur. 2d *Constitutional Law*, 543. Continuing, the Supreme Court has stated that: "Due process of law is the primary and indispensible foundation of individual freedom." *Application of Gault*, 87 S.Ct. 1428, 1439 (1967). The rules under which due process operate are embodied in the concept of "fairness" and "fair play". 16 Am. Jur. 2d, supra at 548. *Hannah v. Larche*, 80 S.Ct. 1502 (1960). "A fair trial in a fair tribunal is a basic requirement of due process . . . our system of law has always endeavored to prevent even the probability of unfairness." *In Re Murchison*, 75 S.Ct. 623, 625 (1955). In discussing the concept

of "fair play" and due process in jury trials, the Supreme Court states: "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process . . . In the ultimate analysis, only the jury can strip a man of his liberty or life." *Turner v. State of Louisiana,* 85 S.Ct. 546, 549 (1965). The facts in this case appear to be less prejudicial to the verdict than the facts in the case at bar. The Supreme Court reversed the lower court's denial of defendant's motion for new trial on the grounds that two government witnesses (deputy sheriffs) had fraternized with the jury during course of trial stating that such fraternization was prejudicial to defendant's right to a fair trial.

The Supreme Court *(Blackburn v. State of Alabama* 80 S.Ct. 274 (1960)) rejects the concept that tainted evidence is immaterial where other evidence establishes guilt. ". . . the Fourteenth Amendment forbids fundamental unfairness in the use of evidence whether true or false." *Blackburn,* supra at 280. The court in this case pointed out that the trial court knew there was no other evidence other than the tainted evidence upon which conviction and sentence would be based. Does not the record indicate in the case at bar that the District Court knew Petitioner's conviction could not be sustained without the false testimony of both Husband and Wife?

The Supreme Court by an unanimous decision held that a criminal conviction cannot be sustained when there is evidence that false testimony was given. Although the court does not directly rely on the Due Process clause for

this conclusion, it alludes thereto when it refers to its supervisory role over all federal courts to see that the administration of justice prevails. Referring to the false testimony given in criminal trials the court said: "The district judge is not the proper agency to determine that there was sufficient evidence at trial, other than that given (by a false witness), to sustain a conviction . . . Only a jury can determine what it would do in a different body of evidence, and the jury can no longer act in this case . . . This is a federal criminal case, and this court has supervisory jurisdiction over proceedings of the federal courts . . . Pollution having taken place here, the condition should be remedied at the earliest opportunity . . . The Government of a strong and free nation does not need conviction based upon such testimony. It cannot afford to abide with them." *(Mesarosh v. United States,* supra at 7 and 9). Continuing the same line, this court in a later case stated that: "Society wins not only when the guilty are convicted but when criminal trials are fair . . . We cannot put ourselves in the place of the jury and assume what their views would have been as to whether (the new evidence) did or did not matter . . . It would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence . . . *Brady v. Maryland* 83 S.Ct. 1194 (1963).

In summary, Petitioner's innocence or guilt rested upon the question of whether or not Wife gave her consent to the 1968 joint tax return. She and her husband testified that she did not agree to it, yet at the time both were testifying under oath they had executed a formal agreement to file jointly. The District Court rejected Petitioner's Motion for New Trial on grounds that evidence submitted at trial was sufficient to sustain the conviction and, fur-

thermore, such evidence is merely impeaching. Evidence that shows testimony at trial is false is not within Rule 33, Federal Rules of Criminal Procedure and, therefore, is not merely cumulative nor impeaching. Furthermore, it is erroneous to conclude that if there is other evidence to sustain the conviction the new evidence is immaterial. Newly discovered evidence that shows false testimony was given at trial leads to the conclusion that the conviction is contrary to law since it was sustained on tainted evidence. Such evidence must be presented to a jury and, therefore, a new trial should be ordered.

CONCLUSION

Petitioner has been convicted of a felony, sentenced to jail and to pay a fine, for preparing a 1968 amended joint income tax return for Mr. and Mrs. McLean. The crime consisted of electing the filing status of married, filing jointly. Conviction was sustained on the fact that both Mr. and Mrs. McLean testified at trial that she did not consent to the return. Subsequent to trial Petitioner discovered a written agreement executed by and between Mr. and Mrs. McLean three days before trial whereby they agreed to file joint returns for all open years, including the year 1968. This agreement showed their testimony to be false. Evidence that shows testimony at trial to be false is not merely impeaching evidence. False testimony constitutes a denial of due process notwithstanding there may be other evidence to sustain the conviction and must be presented to a jury. Thus Petitioner's conviction was based on tainted evidence. Petitioner has been denied his right to a fair trial. It is on these grounds plus the fact that the lower court's Order was predicated upon errors

of law that this Court should grant certiorari and the Judgment below reversed.

Respectfully submitted,

WILLIAM J. BEISWANGER
Attorney for Petitioner
104 North County Road
P. O. Box 746 (832-6357)
Palm Beach, Florida 33480

PROOF OF SERVICE—AFFIDAVIT

I, WILLIAM J. BEISWANGER, attorney of record for Paul C. Washburn, Petitioner, herein depose and say that I served by mail three copies of this petition for Writ of Certiorari to the Supreme Court of the United States upon the Solicitor General, Department of Justice, Washington, D.C. 20530, Respondent herein.

WILLIAM J. BEISWANGER
Attorney for Petitioner
104 North County Road
P. O. Box 746 (832-6357)
Palm Beach, Florida 33480

SWORN to and subscribed before me this 16th day of September, 1974.

ALLEN COLLIER
Notary Public, State of Florida at Large

My Commission Expires May 5, 1978

APPENDIX I

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

v.

PAUL C. WASHBURN

No. 73-143-CR-CF
26 United States Code, Section 7206(2)
M/S 3 yrs.—$5,000.

The grand jury charges:

Count I

That on or about the fifteenth day of April, 1967, in the Southern District of Florida,

PAUL C. WASHBURN,

a resident of West Palm Beach, Florida, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure, and advise the preparation and presentation to the Internal Revenue Service of an income tax return of Edward B. McLean for the calendar year 1966, which was false and fraudulent as to a material matter, in that the said return reflected the filing status of Edward B. McLean to be "unmarried head of household," which status reduced the amount of tax properly

due and owing, whereas, as the said defendant then and there well knew and believed, Edward B. McLean was not entitled to the filing status of "unmarried head of household" or the tax benefit resulting therefrom.

In violation of Title 26, United States Code, Section 7206(2).

The grand jury further charges:

Count II

That on or about the second day of April, 1968, in the Southern District of Florida,

PAUL C. WASHBURN,

a resident of West Palm Beach, Florida, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure, and advise the preparation and presentation to the Internal Revenue Service of an income tax return of Edward B. McLean for the calendar year 1967 which was false and fraudulent as to a material matter, in that the said return reflected the filing status of Edward B. McLean to be "unmarried head of household," which status reduced the amount of tax properly due and owing, whereas, as the said defendant then and there well knew and believed, Edward B. McLean was not entitled to the filing status of "unmarried head of household" or the tax benefit resulting therefrom.

In violation of Title 26, United States Code, Section 7206(2).

The grand jury further charges:

Count III

That on or about the twentieth day of May, 1969, in the Southern District of Florida,

PAUL C. WASHBURN,

a resident of West Palm Beach, Florida, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure, and advise the preparation and presentation to the Internal Revenue Service of an income tax return of Edward B. McLean for the calendar year 1968, which was false and fraudulent as to a material matter, in that the said return reflected the filing status of Edward B. McLean to be "married filing joint return," which status reduced the amount of tax properly due and owing, whereas, as the said defendant then and there well knew and believed, Edward B. McLean was not entitled to the filing status of "married filing joint return," or the tax benefit resulting therefrom.

In violation of Title 26, United States Code, Section 7206(2).

The grand jury further charges:

Count IV

That on or about the eighteenth day of January, 1971, in the Southern District of Florida,

PAUL C. WASHBURN,

a resident of West Palm Beach, Florida, hereinafter called the defendant, did wilfully and knowingly aid and assist

in, and counsel, procure, and advise the preparation and presentation to the Internal Revenue Service of an amended income tax return of Edward B. McLean for the calendar year 1968, which was false and fraudulent as to a material matter, in that the said amended return was signed by the defendant as attorney for Manuela McLean; reflected the filing status of the said Edward B. McLean to be "married filing joint return"; and included thereon income and losses of Manuela McLean, all of which reduced the amount of tax properly due and owing, whereas, as the defendant then and there well knew and believed he held no power of attorney and had no authority to sign or file such amended return on behalf of Manuela McLean; Edward B. McLean was not entitled to the filing status of "married filing joint return"; the income and losses of Manuela McLean could not be included in the amended return of Edward B. McLean; and Edward B. McLean was not entitled to the tax benefit resulting therefrom.

In violation of Title 26, United States Code, Section 7206(2).

The grand jury further charges:

Count V

That on or about the seventeenth day of July, 1970, in the Southern District of Florida,

PAUL C. WASHBURN,

a resident of West Palm Beach, Florida, hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure, and advise the preparation and

presentation to the Internal Revenue Service of an income tax return of Edward B. McLean for the calendar year 1969, which was false and fraudulent as to a material matter, in that the said return reflected the filing status of Edward B. McLean to be "married filing joint return," which status reduced the amount of tax properly due and owing, whereas, as the said defendant then and there well knew and believed, Edward B. McLean was not entitled to the filing status of "married filing joint return" or the tax benefit resulting therefrom.

In violation of Title 26, United States Code, Section 7206(2).

A TRUE BILL

_____

Foreman

ROBERT W. RUST
United States Attorney

By: _____

WILLIAM L. McCULLEY
Attorney
United States Department of Justice
Washington, D.C. 20530

APPENDIX II

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, Plaintiff,

v.

PAUL C. WASHBURN, Defendant.

No. 73-143-CR-CF

MOTION FOR NEW TRIAL AND JUDGMENT OF ACQUITTAL

1. Defendant, Paul C. Washburn, did file with the above named Court on September 28, 1973, a motion for new trial and judgment for acquittal. On December 6, 1973, this Court denied Defendant's motion on the grounds that since an appeal was pending before the United States Court of Appeals, Fifth Circuit, this court was without jurisdiction to entertain that motion. Defendant filed a notice to appeal this order on December 17, 1973. On December 12, 1973, the United States Court of Appeals, Fifth Circuit issued an opinion which affirmed this Court's decision, denying Defendant's Appeal of the verdict below. This decision was received by the Defendant on December 18, 1973. On December 19, 1973, Defendant filed a motion to stay execution of mandate, giving grounds therefor, Defendant's intention to refile the motion for new trial and judgment of acquittal.

2. Since no appeal is now pending in this case, Defendant refiles this motion for new trial and judgment of acquittal.

3. Defendant moves the court to set aside the verdict returned in the above styled case on June 6, 1973, and to grant a new trial on the ground of newly discovered evidence of which Defendant was ignorant at the time of the trial and which he could not have sooner discovered in the exercise of due diligence. The said evidence is not merely cumulative or impeaching in character, but is material and of such character that if received at the trial it would probably have resulted in a different verdict.

(a) Defendant was indicted for criminal fraud under Federal Statute 26 USCA 7206(2) in that he allegedly prepared and filed a false and fraudulent amended 1968 joint income tax return for Edward B. and Manuela McLean, married couple, in that he had no power of attorney or authority to sign or file such return on behalf of Manuela McLean.

(b) The action was tried before the Hon. Charles B. Fulton on June 4, 1973, and a verdict of guilty was rendered by the jury.

(c) Since completion of said trial, on or about August 18, 1973, undersigned and Defendant discovered for the first time certain facts herein set forth in Appendices A, C and F annexed to the Memorandum of Law, which neither the trial attorney nor Defendant could have discovered in the exercise of due diligence before trial for the reason that neither had any way of knowing of the existence of such facts until their discovery by undersigned. Undersigned has communicated these facts to the

Defendant and has been told by Defendant that the disclosure by undersigned of the said facts was the first knowledge that the Defendant had of them as set forth in Defendant's Affidavit. (Appendix F)

(d) The said evidence is not cumulative or impeaching in nature, in that no evidence of the said facts was produced upon the trial by Defendant or the trial attorney. The said evidence is of such a nature and so material that it would probably produce a different verdict if a new trial were granted.

(e) The nature of the new evidence referred to is documented in Appendices A, B, C and F attached to the Memorandum of Law and is summarized herein as follows:

(1) Manuela and Edward B. McLean at trial testified that neither had entered into an agreement to file a joint return for the year 1968 or any subsequent years for which they were eligible to make the election.

(2) Contrary to their testimony, on May 31, 1973, at 4:30 p.m. both Edward B. and Manuela McLean had executed and filed with the Circuit Court of Palm Beach County, Florida a stipulation incident to divorce whereby Manuela McLean had agreed to file joint income tax returns with Edward B. McLean; and Manuela McLean had agreed to furnish Edward B. McLean copies of her income tax returns for years 1968 through 1971. Both parties under this stipulation will share in the tax savings.

(3) Pursuant to this stipulation and subsequent to trial, Edward B. McLean's attorney and accountant prepared a 1968 joint income tax return for Edward B. and

Manuela McLean based upon and not materially different from the same 1968 joint income tax return prepared and filed by Defendant which resulted in Defendant's conviction. They likewise have indicated they intend filing same with the Internal Revenue Service. (Appendix C).

(4) Defendant was found guilty of filing a false 1968 joint income tax return. However, if Manuela McLean had expressed her consent to this return, it would not have been false but true. Preparing and filing a valid and true return is not a crime.

(5) Taxpayers, by testifying that they had not agreed to a joint return, when in fact they had, misled the jury and court into believing the return prepared and filed by Defendant was false. The subsequent ratification of a joint return by the spouse validates the return (see Memorandum of Law), therefore, if Manuela McLean had revealed at trial she had ratified the 1968 amended joint return, this fact would have justified a directed verdict of acquittal for Defendant.

(6) An affidavit from the Clerk of the Circuit Court, Palm Beach County (Appendix B), states that under normal procedure the stipulation would not have appeared in the case filed until June 4, 1973, the first day of the trial; thus not readily discoverable until subsequent to trial.

(7) An affidavit from the undersigned (Appendix C) reveals that a new 1968 joint tax return based on Defendant's 1968 amended joint return was prepared, with the intention to file same, after trial; thus not discoverable prior to trial.

4. Defendant moves the court to enter judgment of acquittal as the court record of the trial conducted on June 4, 1973, as a matter of law, indicates that Defendant did not prepare and file a false and fraudulent 1968 amended joint income tax return for Edward B. and Manuela McLean (see Memorandum of Law attached).

WHEREFORE, in consideration of the premises, Defendant moves that the judgment entered by the Court be vacated, that Defendant's Motion For New Trial and Judgment of Acquittal be granted, and for such other and further relief as Defendant may show itself entitled to receive.

Respectfully submitted,

WILLIAM J. BEISWANGER
Attorney for Defendant
104 North County Road
P. O. Box 746 (832-6357)
Palm Beach, Florida 33480

APPENDIX III

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,
Plaintiff,

v.

PAUL C. WASHBURN,
Defendant.

No. 73-143-CR-CF

MEMORANDUM OF LAW

Defendant was found guilty of commission of criminal fraud under 26 USCA 7206(2) in that he allegedly prepared and filed a false and fraudulent amended 1968 joint income tax return for Edward B. and Manuela McLean, married couple, in that he had no power of attorney or authority to sign or file such return on behalf of Manuela McLean. Edward McLean, however, gave Defendant a power of attorney to prepare and file a joint return (T 28, 55, 91, 92), and thus the return filed by Defendant on the face of it purports to be a valid return. The requisites of the crime then is that the return is both false and fraudulent, the absence of either negates the crime. Thus, if the return was not false then no crime has been committed or, similarly, if the return was false but not fraudulent there is no crime. In conclusion, the amended 1968 joint income tax return was neither false nor fraudulent. Each issue is discussed separately beginning with falsity.

Witnesses and parties are hereby identified as follows:

1. Edward McLean—taxpayer.
2. Manuela McLean—taxpayer's wife.
3. Defendant—taxpayer's accountant.
4. Friedman—taxpayer's New York attorney.
5. Kay—Manuela McLean's accountant.
6. Broberg—taxpayer's Palm Beach attorney.
7. Mrs. Dewey—Defendant's business associate.
8. Gleichauf—Revenue Agent.
9. Dumond—Special Agent, Intelligence.

I. FALSE RETURN

> Was the amended 1968 joint income tax return for Edward B. and Manuela McLean, prepared and filed by Defendant, under a power of attorney from Edward B. McLean, a false return?

In conclusion, this return was not a false return for the reason that Defendant was not required to have a power of attorney or express authority from the spouse to file the return. Manuela McLean gave her tacit consent to the return which is sufficient under the law.

The definition of a false return is one that is "untrue as to a material fact". (Court Instructions T 388). The Government's case against Defendant is predicated upon four factors: (1) the power of attorney was not signed by the spouse, (2) the joint tax return was not signed by the spouse, (3) spouse gave no express authority to Defendant to prepare and file the amended 1968 joint return, and (4) spouse did not agree to file a joint return.

Referring to absence of conveyance of a power of attorney and signature on the return by spouse, Gleichauf

and Dumond made demands of or questioned Defendant in conferences before trial for these two items. (T 170, 176, 177, 178, 222, 224) Upon direct questioning, the Government also elicited from other witnesses verification that spouse gave no power of attorney to Defendant and she likewise did not sign the return. (T 69, 136, 138) Furthermore, spouse testified she gave no oral authority to Defendant to file the joint return (T 70), as also attested to by Defendant's associate. (T 149, 150) Finally, taxpayer and spouse testified they reached no agreement to file jointly (T 34, 68, 75) as corroborated by spouse's attorney. (T 136) Defendant will hereby prove that: (1) no power of attorney or express authority from spouse was required of Defendant, and (2) spouse need not sign the joint return. Spouse did give her tacit consent to file the returns in question (original and amended 1968) and, therefore, these returns are valid negating the element of "falsity". Discussion below relates to both the original 1968 joint return filed in May, 1969, and the amended 1968 filed in January, 1971. Defendant hereby alleges that the original 1968 joint income tax return was a valid return for both Edward and Manuela McLean. Correspondingly, since the original 1968 joint return was valid, likewise, so is the amended. The 1968 separate return filed by spouse in October, 1969, was invalid and, therefore, must be treated as a nullity by the Internal Revenue Service.

A. LAW

The regulations to the Internal Revenue Code (1.6013-(a)(2); see also Appendix E) require signatures of both spouses on a joint income tax return. However, the courts hold this regulation to be invalid. The Government is

mainly responsible for overturning this regulation by bringing suit against the wife for tax deficiency and/or fraud and she defends that she has not signed the return. The Government and the Courts reject this defense. *O'Connor et al. v. Comm.* (CA 2, 1969) 412 F.2d 304, cert. den.; *Muriel Heim* (CA 8, 1958) 251 F.2d 44; *Anderson v. U. S.* (CA 5, 1931) 48 F.2d 201; *Tyson v. U. S.* (D.C. Mass.) ____F.Supp.____; *Sharwell v. Comm.* (CA 6, 1969) 419 F.2d 1057. Whether or not the return is a joint return is a question of fact depending on the intent of the parties (*O'Connor et al. v. Comm.*, supra), and such intent may be shown by ". . . the lack of a reason for refusal to file a joint return, the absence of objection, the delivery of tax data to husband for the purpose of making the tax return, and the apparent advantage in filing a joint return . . .". *Muriel Heim*, supra at 47. Other factors to be considered are: (1) statements made by wife (*Tyson v. U. S.*, supra; *Mathew L. Ladden*, 38 T.C. 530, dismiss 3rd Cir. 1963); and (2) whether or not the wife had separate income (*O'Conner et al. v. Comm.*, supra). Reliance upon mistakes of accountants or experts will not controvert wife's intent. *O'Connor et al. v. Comm.*, supra; *Kiesling v. U. S.* (D.C. Texas 1958) 171 F.Supp. 314. A return filed in the name of husband and wife is presumed to be a joint return notwithstanding wife has not signed it; and if wife later learns of the return and she desires to repudiate it, she must do so overtly by protest or objection. *Muriel Heim*, supra, *Thomas J. Leger* Para. 70,036 P-H Memo TC. Notwithstanding wife has no knowledge that a joint return has been filed on her behalf, once learning of it she may later ratify or acknowledge it. *Mathew L. Ladden*, supra. Therefore, regardless of the fact that spouse has not signed the joint

tax return she may give her tacit consent to it, on or after filing, and such consent is determined by her affirmative actions or words or by lack of repudiation after becoming aware of it.

The law pertaining to powers of attorney is not quite so definitive. However, signatures on powers of attorney are dealt with in the second sentence of the same regulation pertaining to signatures on joint returns. (Appendix E) If the regulation pertaining to the requirement of wife's signature on a joint return is invalid, is it not reasonable to conclude that the regulation pertaining to signatures on powers of attorney to file is likewise invalid? Or, whether or not a joint return is made between husband and wife depends on the intent of the parties, and the lack of wife's signature alone on the return or on a power of attorney is not sufficient to negate her intent. Furthermore, the ambiguous wording of this sentence appears to state that an agent can sign the return as agent for one or both spouses. Whatever the reason, a joint return is not held invalid because the wife has not signed a power of attorney if her consent to it is otherwise expressed.

Once an election has been made by husband and wife to file a joint return, separate returns for one or both are not permitted. IRC Reg. 1.0613-1(a)(1), (Appendix E); *Thomas J. Leger,* supra; *Mathew L. Ladden,* supra.

B. EVIDENCE

As shown above, the law requires neither oral or written authorization by a wife as a requirement to joint returns. Special Agent, Dumond, indicated that he made an extensive investigation of this case (T 248, 249), but his testimony reveals that he made no investigation of the

law by his repeated demands from Defendant for a power of attorney or signature of wife. Since there is no evidence of express authorization to file joint return by Manuela McLean, the remaining factor to resolve is whether or not she gave her tacit consent to the joint return, and the evidence is overwhelming that she did. In her own mind she may not have realized she gave consent, but an examination of the facts as they relate to the court decisions cited above lead to the unequivocal conclusion of intent to join with her husband in the filing of 1968 joint returns. The same conclusion or assumption by others that no consent was given is also in error.

In order to more fully understand the facts it is necessary to review the sequence of important events which occurred as follows:

1. May 15, 1969—original 1968 joint return filed. (T 261)
2. July 7, 1969—Kays' letter to Defendant not to file joint returns, etc. (T 261)
3. October, 1969—separate 1968 return filed on behalf of Manuela McLean. (T 118)
4. January 18, 1971—amended 1968 joint return filed. (T 263)

Based upon the law cited above, if taxpayers made a valid election in May, 1968, to file jointly, the separate return filed by Manuela McLean is null and void as the original election may not be revoked. If the original joint return is a valid return then, correspondingly, the amended 1968 return is also valid. In fact, since it is a corrective return including items that should have been included on the original return, it may be concluded that if the original is

valid, the validity of the amended is greater than the original. (The amended return included an identical copy of the original accompanied by a Form 1040-X showing the changes.) Defendant asks the Court to take judicial notice that since Edward and Manuela McLean were still married in 1968 they were entitled to file a joint return for that year.

> The issue, then, is: Did Manuela McLean give her tacit consent to filing the original 1968 joint return having the effect of nullifying her separate return and validating the amended 1968 return?

The answer to this interrogation is an unqualified, "yes". Therefore, the question which naturally follows is: How did the jury find Defendant guilty of a felony by his filing the amended 1968 return? The answer is obvious from the testimony. First, the Internal Revenue Service led the jury to believe that Manuela McLean's signature or other express authorization was a requirement to filing jointly and the jury was not informed to the contrary. Secondly, Manuela McLean and other witnesses understood that if she conditioned her agreement to file jointly that there is no agreement. This legal assumption has no support in the law and again the jury was ignorant to the contrary. Thirdly, Kay's letter to Defendant not to file a joint return without Manuela McLean's signature was subsequent to the filing, i.e., the joint return had been filed previous to this instruction with tacit consent of Manuela McLean and, therefore, the joint election once made could not be revoked! The jury assumed that Defendant deliberately violated Kay's instructions not to file jointly, but was not made aware that Defendant could not abide by the terms of Kay's letter because the return was

filed before the letter was received by Defendant. Manuela McLean's testimony unequivocally expressed her misconception that she never agreed to joint returns as, for example, "We made various conditions, but we never came to an agreement". (T 67, 68, 69, 75) Edward McLean confirmed the same impression. (T 34) However, it is interesting to note that at the time these two persons made these statements to the jury they had, unknown to Defendant, signed and filed an agreement with the Circuit Court of Palm Beach County to make joint returns for 1968 and other years (Appendix A), and Manuela McLean indirectly acknowledged this agreement when she told the jury she bought her Palm Beach home from her husband. (T 73, 74; see also paragraph 2(b), Appendix A) This is a pertinent example how uninformed laymen can readily misconstrue the complexities of the law; otherwise, it may be assumed that both Edward and Manuela McLean were committing perjury during the trial. Attorneys for both Edward and Manuela McLean also stated no agreement had been made (T 83, 84, 136), but these two qualified their opinion with a self-confessed admission that they were not tax attorneys. (T 83, 133) Kay, Manuela McLean's accountant, read the letter he sent to Defendant which stated in part that "Until the return is submitted to her for her signature and she actually signs it, no joint tax return is to be filed for her". (T 116) His testimony likewise confirmed no agreement to filing joint returns. (T 123) Therefore, looking at this evidence as a whole and being ignorant of the law, it is readily understandable how the jury reached its erroneous conclusion.

Manuela McLean always expressed her willingness to file joint income tax returns with her husband, but since she and her husband were negotiating a property settle-

ment agreement incident to divorce her qualification was that she would sign the returns only if she received a certified check from her husband for one-half of the tax savings. Friedman and Kay confirmed the condition (T 68, 69, 75, 76, 84, 94, 100, 116), and the Government calls it a "condition" to her agreement. (T 69) However, this condition does not negate the fact that Manuela McLean gave her tacit consent to file joint returns. The requirement was that no joint return was to be filed until submitted to her for her signature. (T 116) Her condition, therefore, went to her agreement to *sign the returns* only (T 116) which, as indicated above, is not a necessary requisite under Federal law. This condition may be upheld under state law relating to a property settlement agreement between spouses but Federal law makes no provision for conditional consents to filing joint returns. (IRC 6013) Intent of the parties, not signatures, is the criterion to validity of joint returns. Therefore, applying Federal law to this case, Manuela McLean's condition that she receive one-half of the tax savings by certified check before signing the return must be ignored leaving the question open as to whether or not there is sufficient evidence to show tacit consent to the original joint return filed in May, 1968.

Summarizing the court decisions above, the factors showing intent to consent to file a joint return are: (1) lack of reason for refusal to file, (2) absence of objection or protest by wife, (3) delivery of tax data to husband, (4) advantages of filing a joint return, (5) statements made by wife, and (6) whether the wife had separate income. Once intent is shown, a mistake in law by wife's accountant does not negate this intent. There is no question that there were tax savings to be gained by filing

jointly through the income-splitting effect even without wife's data; but more important since Manuela McLean had substantial operating and capital losses (T 115, 221) which in themselves have no tax advantage to wife when incurred, and Edward McLean was grossing in the neighborhood of $75,000 per year (T 41) a joint return was particularly advantageous to them. There was no reason not to file jointly since both parties were to benefit through tax savings. (T 108) This is reflected by the fact that the original 1968 joint return failed to include Manuela McLean's losses precipitating the preparation and filing of the amended return for that year. Furthermore, at the time of filing this Motion both Edward and Manuela McLean as part of a divorce agreement have entered into a stipulation to file joint returns for 1968 and other years and to share the tax savings, and they are presently pursuing the matter before the Internal Revenue Service. (Appendices A, C) Manuela McLean, through her accountant, sent her tax data to Defendant, and asked for a copy of the calculation of the tax savings! (T 108, 115) Manuela McLean's testimony acknowledged that she, through her representatives, offered to file jointly with her husband (T 68, 69); that negotiations were taking place (T 74, 75, 76, 77); and that she did file jointly with her husband in 1965. (T 76) Friedman, taxpayer's attorney, also confirmed the negotiations (T 82), and that Manuela McLean would sign joint returns subject to her terms. (T 83) Edward McLean confirms negotiations to file jointly. (T 33, 52, 53, 54, 55) Kay also confirms offers and negotiations to file jointly (T 115, 116) as well as Special Agent, Dumond. (T 209, 219, 224, 261)

Manuela McLean was aware that the original joint 1968 tax return was filed on behalf of her and her hus-

band! In Kay's letter to Defendant of July 7, 1969, he stated that "my client has asked me to obtain the following: 1. A copy of the previously *filed* joint Federal Tax Return for 1968 (not signed by Mrs. McLean). 2. A copy of the proposed 'Amended Joint' Federal Income Tax Return for 1968." (T 115) Furthermore, he acknowledges that the return was a joint return, not signed by his client, that he saw a copy of it and forwarded same to his client or her attorney. (T 118, 122, 127, 130) Kay also testified he discussed the tax savings with Manuela McLean. (T 108) In Kay's second letter to Defendant (T 124, 125), he made an erroneous assumption that Edward McLean would file separately if there was no reply. His first letter and testimony reveal that Kay already knew that Edward McLean filed a joint return.

Special Agent, Dumond, also acknowledges that he had the "July 7th letter" in his possession, therefore, presuming that he also had knowledge that Manuela McLean knew of the filing of the original 1968 return. (T 230)

Although evidence supports the conclusion that Manuela McLean knew the joint return was filed, there is no evidence that Manuela McLean took one single step to disaffirm it. Since there is a presumption that returns made in the name of husband and wife are joint returns, if the wife knows of the return and she or her representatives have copies of this return she must make known her objection or in some manner protest it. This Manuela McLean did not do. Furthermore, she evidences her acquiescence thereto by sending information to correct the original return and asking for copies of the original and proposed amended. Also, a rebuttal to any allegation that an objection may have been made is the fact that she had

entered into an agreement to sign joint returns and share in the tax savings at time of trial. (Appendix A)

To summarize, the signature of Manuela McLean either on the return or power of attorney is not required, but she gave her tacit consent to it as evidenced by the following factors: (1) an overall tax savings to her and her husband, (2) that she sent her tax data to Defendant, (3) that she was always willing to file jointly if she participated in the savings, (4) that she knew the return was filed and did not object to it, and (5) that she eventually agreed with her husband to formalize the return by signing it and sharing in the savings. Her condition to signing the return is invalid under Federal law. Kay's errors that he was required to file separately for her, and that Defendant was not to file the amended return without her signature cannot be imputed to Manuela McLean to negate her intent. She gave no express consent but evidence of tacit consent is overwhelming. Thus, since the original 1968 joint return is valid, the separate return filed on Manuela McLean's behalf is invalid and the amended 1968 return is not false but true.

II. FRAUD

A. LAW

Assuming, arguendo, that the return is false, the element of the crime is that Defendant did "willfully" prepare and file said return with the purpose of defeating income taxes. The crime is not committed in the absence of a showing of "willful". While there are numerous definitions of "willful", "The word often denotes an act which is intentional, or knowing, or voluntary as distinguished from accidental". *U. S. v. Murdock,* (1933) 55 S.Ct. 223, 225.

". . . willfull means voluntary, purposeful, deliberate, and intentional as distinguished from accidental, inadvertent or negligence." *Yarborough v. U. S.*, (CA 4, 1956) 230 F.2d 56. It may be contrasted to careless, thoughtless, heedless. *Haner v. U. S.*, (CA 5, 1963) 315 F.2d 793. Willful carries with it the element of "evil motive" or "bad purpose". *U. S. v. Murdock*, supra; *Spies v. U. S.*, (1943) 317 U.S. 492; *Wardlaw v. U. S.*, (CA 5, 1953) 203 F.2d 884. "It also requires a specific wrongful intent to conceal an obligation. . ." *U. S. v. Martell*, (CA 3, 1952) 199 F.2d 670. Such specific intent must be proved by independent evidence (*Holland v. U. S.*, (1954) 75 S.Ct. 127; *Hargrove v. U. S.*, (CA 5, 1933) 67 F.2d 820; *Wardlaw v. U. S.*, supra which ". . . is a matter of subjective process." 10 Mertens, *Encyclopedia of Federal Income Taxation*, Sec. 55 A 9 (1970).

Defenses to "willfulness" are often incorporated in the definition or is frequently defined by what it is not. "The word is also employed to characterize a thing done without ground for believing it is lawful." *U. S. v. Murdock*, supra at 225. Errors of law negate the crime. The reason for this rule is aptly stated by the Supreme Court when it said that the income tax law is so complex that errors are numerous. Even if the error is the result of gross negligence or intentional disregard of the law, such mistake will not constitute the crime, as such errors are covered by civil sanctions. Innocent errors are corrected by assessment. (Defendant pointed this out to Plaintiff.) The Court goes on to state that: "It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care" *Spies v. U. S.*, supra at 497. ". . . bona fide misconceptions of the law, such as would negative knowledge

of the existence of the obligation, would . . . justify a verdict for the defendant." *Wardlaw v. U. S.*, supra at 885. Defendant's diligence with regard to researching the law is unimportant as the Court of Appeals, Fifth Circuit, citing Merten's, said that ". . . mere laxity, careless disregard of the duty imposed by law, or even gross negligence, unattended by 'evil motive' are not probative of willfulness." *Edwards v. U. S.*, (CA 5, 1963) 321 F.2d 324, 326. (See also *Yarborough v. U. S.*, supra.) Bona fide mistakes of fact likewise negate a crime. "A mistake, standing alone, is not sufficient to sustain a conviction." 10 Mertens, *Encyclopedia of Federal Income Taxation*, Sec. 55 A 9, pg. 47 (1970). The Supreme Court said that: "Congress did not intend that a person, by reason of a bona fide misunderstanding . . . should become a criminal by his mere failure to measure up to prescribed standards of conduct." *U. S. v. Murdock*, supra at 226.

Defendant must have a logical reason or motive for his acts. *Oliver v. U. S.*, (CA 7, 1931) 54 F.2d 48. The absence of same constitutes a defense.

Good faith reliance on advice of others negates specific intent. "If Defendant received advice from counsel and acted on that advice in good faith he is not chargeable with criminal failure." *Hargrove v. U. S.*, supra at 823. (See also *Ashe v. U. S.*, (CA 6, 1961) 288 F.2d 725 and *Forster v. U. S.*, (CA 9, 1956) 237 F.2d 617.

The evidence, beyond a reasonable doubt, must support the inference of an evil motive or the state of mind of Defendant to commit the crime. A conviction cannot be sustained without it. *Spies v. U. S.*, supra; *U. S. v. Martell*, supra.

To summarize: "A distinction must be drawn between carelessness of the "most gross kind", and the "criminal design" which is the essence of the offense. . . . the phrase "bad purpose" used as a characterization of "willfulness" serves merely to distinguish situations involving bona fide misconceptions of what is required from those where the failure to file has been attended by the legal obligation and purpose to prevent the Government from getting that which it lawfully requires. . . . "willfully" means intentionally, that is, not accidentally and it connotes and carries with it the idea of knowledge of the criminality of the act alleged to have been committed." 10 Mertens, *Law of Federal Income Taxation*, Sec. 55 A 9, pg. 44 (1970).

B. EVIDENCE

(1) *Conclusion:* The evidence overwhelmingly supports the conclusion that Defendant did not possess the criminal mind. Defendant did not act with an "evil purpose" or knowledge that he was intentionally committing a crime. His reason or motive for filing the return belie that fact. The most that can be shown in this case is that Defendant made a bona fide mistake of law or fact on good faith reliance upon taxpayer and his representatives.

(2) *Mistake of Law or Fact*

Did Defendant have reasonable belief that joint income tax returns were valid returns?

As discussed under "False Return", the courts have held that a spouse's signature on a joint return is unnecessary, that whether or not a joint return has been made depends on the intention of the parties. Frequently this doctrine has been promulgated by the Internal Revenue Service to hold the wife liable for husband's income tax defici-

encies in direct contradiction to their own regulations requiring the signature of both parties. *O'Connor v. Comm.*, supra; IRC Reg. 1.6013-1 (2). A perusal of an income tax service on this point (Prentice-Hall, *Federal Taxes* Para. 35,070) reveals that approximately 40% of the cases on this question held the return to be a joint return despite the absence of a signature! An ordinary prudent tax professional would be in derogation of his professional duty if he failed to take note of this law and the fact that filing status is determined by intent of taxpayers not signatures!

Notwithstanding both signatures are not required on a joint return, was Defendant's criminal intent shown because he applied the above doctrine to returns prepared and filed under a power of attorney? (Defendant prepared and filed a joint return under power of attorney signed only by the husband.) A reasonable legal conclusion could be drawn by ordinary prudent tax preparers that if both signatures are not required on the return, then both signatures are not required on a power of attorney. If a presumption exists that a joint return is made between spouses notwithstanding lack of two signatures, is it logical to conclude that the presumption is rebutted when only one signature appears on the power of attorney? This is apparently the conclusion reached by the Internal Revenue Service. (T 222, 224) Yet, is it not more reasonable to conclude in the opposite?

The regulations to the Internal Revenue Code shed no light on this problem. Defendant refers to two regulations (IRC Reg. 1.6013-1(a)(2)—Appendix E and IRC Reg. 1.6012-1(a)(5) dealing with the ability of agents to make a joint return for husband and wife. Quoting in part from

the former which pertains to joint returns, this regulation states ". . . or where a third party signs a return as agent for *one or* both spouses." The words 'one or' were added at a later date. (See Appendix E) The latter regulation states that a power of attorney must accompany a return if made by an agent. Is it not reasonable to conclude, by a reading of these two regulations together (since the former refers to the latter), that if no agent prepares a joint return a power of attorney need be signed by one of the spouses only? If this conclusion is in error, then it amounts to an honest difference of opinion.

It does not logically follow that two signatures are required on a power of attorney. Since this sentence appears in the same regulation requiring signatures of both husband and wife on the return, and since this regulation is invalid, the second sentence in the same regulation which may appear to require a power of attorney to be signed by both spouses is likewise invalid. Or, a more valid conclusion is that the power of attorney that was filed with the return was legally sufficient as to husband, and the wife gave her tacit consent. (See "False Return" above.) In any event, sufficient question is raised by Defendant as to the legality of his act, viz., preparing and filing a joint income tax return for taxpayers under a power of attorney signed only by the husband to negate any allegation of criminal intent. In a question put to Friedman whether or not the power of attorney purported to give Defendant the right to file joint returns, this lawyer stated that it was a legal question but a layman could construe that it would! (T 92)

Another classic example of a mistake in law was committed by Kay who on testimony stated he had been an

accountant for approximately 30 years. (T 106) Kay acknowledged he saw a copy of the original joint 1968 return, asked for a copy of it and forwarded it to his client (T 118, 122, 127, 130), but insisted that he was required to file a separate return for Manuela McLean. (T 115, 118, 119, 120, 124) Although he stated that it was not his intention to express legitimacy as to the filing of the joint return (T 130); he failed to take note that joint returns are presumed under these circumstances unless the presumption is rebutted, and that separate returns are not permitted once the election to file jointly has been made. (See "False Returns" above.)

Dumond, Special Agent, Intelligence, was the individual primarily responsible for this criminal prosecution. Without his recommendation, this case would never have been tried. (T 237) Yet his testimony glaringly reveals that this witness (and his supervisor) did not research the law or if they did they deliberately chose to ignore it. In regard to joint returns, Dumond questioned lack of wife's signature on the original 1968 and 1969 joint income tax returns. (T 219, 222) Defendant and his associate, Mrs. Dewey, stated (T 208, 209, 219, 223, 224, 228) that Manuela McLean intended to file jointly, and yet Dumond appears to be under the impression that wife is required to sign a joint return, the tacit consent is insufficient. (T 22, 224) In fact, he questioned the ability of taxpayers to file as "married" persons filing jointly for 1968 and 1969 (T 223), and earlier in the testimony questioned the filing status "unmarried" head of household. (T 204-208) Testimony is replete with separation and divorce negotiations taking place over a period of approximately 7 years including the filing of a law suit by the wife in New York. (T 90) But Dumond charges Defendant with

the absolute duty of determining correct legal marital status (T 207), a point on which he himself shows considerable confusion!

Dumond commits the same error as Kay, that once an election to make a joint return has been made it can be revoked. (T 230) The joint return had been filed with spouse's tacit consent prior to Kay admonishing Defendant not to file a joint return. The instruction was too late, therefore, Manuela McLean's separate return was void. Dumond failed to take notice of this fact as well as Mr. Webb, Dumond's supervisor. (T 233-234)

Mr. Dumond and Mr. Webb are not the only employees of the Internal Revenue Service to display ignorance of the law in this matter. Revenue Agent, Gleichauf, the first to suspect fraud (T 194), referred the case to Intelligence on the fact that there was no power of attorney and the return had not been signed by the spouse. (T 170, 176, 177, 178) This witness not only displayed his ignorance with regard to signatures, but admitted on testimony that he, himself, had no knowledge of the law pertaining to powers of attorney! (T 182, 183) Another example of confusion among the Internal Revenue Service employees is the conflict of opinion whether or not Defendant's act constitutes a forgery. (Defendant was not charged with this crime.) Dumond says that it does (T 258) and Revenue Agent, Gleichauf, says it does not. (T 192)

Has not the Government overreached itself when under the auspices of its employees, it indicts one of its citizens for failure to know the law when the very employee who precipitated the indictment, leading to Defendant's conviction, by his own admission, acknowledged he was

ignorant of the law responsible for the alleged crime; and the other employee, although not admitting ignorance, displays same in his testimony! Can Defendant be guilty of a felony on alleged ignorance of the law when the prosecutors admit and display their own ignorance as well as differ as to legal conclusions on the very points of law Defendant has allegedly violated?

Defendant at most can be charged with committing errors of law and fact. But an examination of the record indicates that Defendant was more cognizant of the law and facts than his mentors and prosecutors. Defendant on numerous occasions advised Dumond that it was his understanding that Manuela McLean would sign the joint income tax return when the divorce decree became final. (T 208, 209, 219, 223, 224, 228) Defendant's impression was confirmed by Mrs. Dewey (T 209, 219, 221) and also by Judge Broberg. (T 228) In fact, taxpayer and spouse did enter into a formal agreement to file joint returns three days before trial as Defendant advised the Government they would! (Appendix A)

Defendant advised both Gleichauf and Dumond that if errors had been made the Government should correct them through civil remedies not criminal, the same conclusion reached by the United States Supreme Court (*Spies v. U. S.*, supra). (T 188, 192, 193, 235)

(3) *Reliance on Others*

Did Defendant have sufficient cause to rely on others that joint returns were proper?

Bona fide reliance upon third parties negates criminal intent. Again referring to Dumond's testimony, he stated

that Defendant told him that there had been continuing negotiations between attorneys for taxpayer and spouse and that she would agree to sign joint returns. (T 208, 250) Testimony of taxpayer stated that he gave Defendant power of attorney and that attorneys had been in contact with Defendant over filing jointly. (T 28, 33, 34, 53, 54, 55) Taxpayer, himself, also acknowledged the possibility of discussing filing jointly with Defendant. (T 37) However, taxpayer stated that he never agreed with his spouse to file jointly (T 34); but at the time he made this statement, an agreement signed by himself and his spouse was on file with the Clerk of the Circuit Court for Palm Beach County. (Appendix B) Attorney for taxpayer, Friedman, likewise admits that he discussed joint returns with Defendant as part of divorce negotiations. (T 81, 82) He acknowledged telephone calls and discussions with Defendant throughout 1969 and 1970 over filing joint return and tax savings involved. (T 83, 92) This witness further acknowledged that Defendant received the power of attorney from his office. (T 87, 90) Friedman again stated that he discussed filing amended joint returns with Defendant, and was requested by taxpayer to contact Defendant to discuss the amount of the tax savings. (T 93) Again this witness testified taxpayer requested him to prepare an agreement to file jointly with his spouse. (T 95) Defendant believed that Friedman had given him authority to file the joint return. (Appendix D)

Taxpayer's Palm Beach attorney likewise testified that Defendant was part of discussions pertaining to joint returns but could not state that he advised Defendant that negotiations to get spouse to sign were unsuccessful!

(T 136) Defendant was not part of the lengthy and complex divorce negotiations; his role was merely to prepare tax return. (T 141)

Mrs. Dewey, Defendant's associate for some 6 or 7 years, testified there were telephone calls and negotiations between the attorney and accountant (Defendant) confirming that joint returns were desired; that it was her impression that taxpayer's spouse would sign the return, and that there was "a lot of confusion" and chaos over the entire matter. Information was being received in the office from different people. (T 149, 153) Mrs. Dewey further elaborated that the events preceding the filing of the joint return indicated that spouse had agreed to sign a power of attorney (T 154, 155); that her impression was that they had a power of attorney (T 157, 164); and that they had difficulty getting cooperation from the people who were responsible for submitting the information. (T 161)

Revenue Agent, Gleichauf, testified that Defendant told him that "he (Defendant) felt that Mrs. McLean was entitled to file a joint return and would be filing a joint return." (T 180)

Representatives of taxpayer and spouse were in frequent contact with Defendant over filing joint returns, information was being received from several sources, much confusion reigned during the negotiating stages (in which Defendant did not participate) and he honestly believed he had authority to prepare and file joint return. Should not Defendant rely more on his client and client's attorney than on Kay's instructions in his "July 7th" letter that was invalid on its face?

(4) *Reason or Motive for the Crime*

Did Defendant have sufficient reason or motive to perpetrate the crime charged?

Defendant received $500 from taxpayer which amount was reported on taxpayer's return. (T 160, 190) Taxpayer testified that this amount constituted the entire fee and Defendant would get no percentage or share in anyway as to any tax refunds. (T 58) Revenue Agent, Gleichauf, testified that his investigation did not reveal any additional compensation other than Defendant's normal fee (T 190), and Defendant's associate testified that the $500 fee was reasonable based on the complexity of the return. (T 161)

Defendant has been an employee of the Internal Revenue Service and a private tax consultant, according to the record, a minimum of 12 years (T 132, 197) and, therefore, it is not unreasonable to assume that Defendant is aware of the criminal fraud provisions of the Internal Revenue Code. The audit of taxpayer's returns began in August, 1969 (T 168), but the so-called false and fraudulent return responsible for Defendant's alleged crime (amended 1968) was filed in 1971 during the period the Internal Revenue Service was making an audit! (T 186) Would a person of Defendan's background and knowledge of the law deliberately and knowingly file a fraudulent tax return fully aware that the Internal Revenue Service was making an investigation of taxpayer's accounts? Revenue Agent, Gleichauf, who holds the same position as did Defendant when he was employed with the Service (T 197), indicated that this would be a stupid act on part of Defendant. (T 187) Special Agent, Dumond, testified he has known Defendant 10 or 11 years (T 267)

including part of the period Defendant was with the Service. (T 197) He further testified that in his conferences with him that Defendant appeared to be "composed". (T 266)

Therefore, making the reasonable assumption that Defendant is aware of the criminal penalties predicated upon his years of training and experience as an employee of the Internal Revenue Service and as a private tax practioner, belie the fact that he would willfully and knowingly prepare and file a false and fradulent tax return for the sum of $500 which, under the statute, calls for a fine of up to $5,000 and/or imprisonment of up to 3 years while the tax return is under examination by the Internal Revenue Service!

(5) *"Evil Purpose", "Bad Motive"*

Did Defendant deliberately intend to deceive or falsify a material fact?

A showing that Defendant deliberately and knowingly deceived the United States Government is essential to the crime (see "Instructions" by the Court, T 388, et. seq. and court decisions, supra). As the Supreme Court said in *Spies v. U.S.*, supra, lack of presence of this element distinguishes the crime from civil penalties. Uncontested and unequivocal testimony of both employees of the Internal Revenue Service and others reveal that Defendant practiced no deception.

Defendant was indicted for having no power of attorney and no authority to file the amended return for 1968 on behalf of taxpayer's spouse. Defendant signed the amended 1968 return "E. B. and Manuela McLean by Paul C. Washburn, P.A.". (T 220) Normally signa-

tures of both husband and wife are required on joint returns. Signing in this fashion purported to be nothing more than to show that Defendant had authority to file jointly. Defendant did not sign wife's name! Manuela McLean testified that it did not purport to be her signature (T 71), and Gleichauf reiterated that no forgery had been committed and that in his opinion the return did not contain spouse's signature. (T 186, 192)

Defendant attached the power of attorney to the tax return authorizing him to file jointly signed only by taxpayer which was examined by the Internal Revenue Service. Defendant did not attempt to conceal the fact that the power had no signature of spouse. This instrument purports to be nothing more than authority to file a joint return. (T 92, 171, 172, 173, 178)

Other evidence of lack of deception is the instance when Gleichauf told Defendant he had no return for 1968 and Defendant willingly furnished him with one. (T 175) Also, compensation paid Defendant by taxpayer was reported on the return (T 160, 191, 257), and there was no evidence of any hidden fees. (T 190) Defendant not only cooperated with the Internal Revenue Service but volunteered all information regarding the tax matters. (T 254) Gleichauf testified that Defendant did not attempt to conceal any fact or make untruthful representations to him. (T 187, 188, 193)

In summary, there is not a scintilla of evidence that Defendant practiced deception. Conversely, employees of the Internal Revenue Service and others testified that Defendant was truthful and open; and their investigation revealed nothing outside what Defendant told them or reported on the tax return.

(6) *Subjective Intent*

Citing from *U. S. v. Glascott,* (CA 7, 1954) 216 F.2d 487, cert. den. 348 U.S. 937 (1935), Merten's states that "willfullness" " . . . is a matter of subjective process". 10 Mertens, *Law of Federal Income Taxation,* Sec. 55 A 9 (1970). The question is: Did Defendant himself believe that he at anytime was committing a criminal act? The answer must be an unequivocal 'no'.

Dumond testified on numerous occasions that Defendant told him that it was Defendant's understanding that as soon as the divorce negotiations were terminated that Mrs. McLean would formalize the joint returns (T 208, 209, 219, 223, 224, 228), and that errors should be corrected through civil not criminal process. (T 188, 192, 193, 235) Although Defendant did not take the stand, testimony of Defendant's belief by the Internal Revenue Service is better evidence than if Defendant had made the statements himself.

Gleichauf testified that Defendant never indicated to him that there was any possibility of a criminal prosecution (T 188), and Defendant's associate testified that she had never known Defendant to deliberately prepare any false returns. (T 159)

Subsequent to the trial, Defendant volunteered to undergo an examination as to his state of mind. (Appendix D) In summary, he was asked if he believed he had authority to file the joint return and if he thought he was committing a crime. The annexed examiner's opinion indicates that Defendant did believe he had authority and that his acts were not criminal.

Further evidence reveals that at the time the amended 1968 return was filed Defendant was suffering from severe emotional problems and in fact was hospitalized as a result thereof. (T 158, 159, 163)

SUMMARY

Taxpayer was found guilty of committing a felony by filing a false and fraudulent return. Part I shows that the return was not false but true. Part II further indicates it was not fraudulent. Defendant's subjective intent reveals that he believed he had authority to file the return and, therefore, was committing no crime. Such belief was predicated upon good faith reliance on representations made to Defendant by taxpayer, accountant, and attorneys. There is no evidence that Defendant attempted to deceive anyone as to any fact. The most that can be alleged is that Defendant made a bona fide mistake of law or fact. Any one of these factors negates "willfulness" and fraud. Since the crime is committed only by showing both elements (false and fraudulent) and neither is present, Defendant is innocent as a matter of law.

An examination of this case in retrospect gives rise to a startling revelation. The Internal Revenue Service made certain legal assumptions, and set about to prove that Defendant had acted in contradiction thereto. Unfortunately, they were successful before the jury in establishing or proving their case. However, the legal conclusion upon which their case was predicated is contrary to the law of this land.

CONCLUSION

Taxpayer instructed Defendant, by granting him a power of attorney, to file joint returns for himself and his

spouse. Substantial tax savings accrue to the parties if such return is filed. Is it not Defendant's professional responsibility to legally minimize his client's tax liability? Since taxpayers were eligible to file a joint return and it does not require the wife's signature if she gives her tacit consent thereto, would not Defendant be in derrogation of his duty if he did not comply with his client's instructions? Yet, performing this duty resulted in Defendant being convicted of a crime. Defendant, then, is damned if he does and damned if he doesn't. Congress did not intend these circumstances to result in the commission of a crime.

WHEREFORE, Defendant hereby moves the Court to grant a new trial for Defendant and to enter a judgment of acquittal.

Respectfully submitted,

WILLIAM J. BEISWANGER
Attorney for Defendant
104 North County Road
P. O. Box 746 (832-6357)
Palm Beach, Florida 33480

APPENDIX A

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

CASE NO. 71C-4077—MacMILLAN

IN RE:
THE MARRIAGE OF
EDWARD B. McLEAN, Husband,
and MANUELA H. McLEAN, Wife.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the Petitioner, Edward B. McLean, and the Respondent, Manuela H. McLean, as follows:

1. Subsequent to the Final Judgment entered herein on April 13, 1973, the Respondent filed a Motion to Amend Final Judgment and a Petition for Rehearing and the Petitioner filed a Motion to Amend Final Judgment. As of the date hereof, the Motions and the Petition are not set for hearing.

2. The parties have reached a settlement of all matters relating to alimony, property and attorney's fees, and in consideration of the Respondent agreeing to withdraw her Motion and Petition referred to above, of the Petitioner agreeing to withdraw his Motion referred to above and of each party agreeing to waive any right of appeal from the aforesaid Final Judgment entered on April 13, 1973, the parties agree that the provisions of said Final Judgment contained in paragraphs 2 through 7, inclusive, shall be of no force and effect and that the following provisions

shall govern in all matters relating to alimony, property and attorneys' fees:

(a) The Respondent shall receive no alimony from the Petitioner.

(b) Respondent shall pay to Petitioner the sum of TWO HUNDRED SIX THOUSAND AND NO/100 DOLLARS ($206,000.00), in the form of a cashier's check made payable to Frederick H. Hope, Trust Account, and contemporaneously with such payment the Petitioner will deed to Respondent his interest in the property known as 102 Canterbury Lane, Palm Beach, Florida, more particularly described in paragraph 7 of the aforesaid Final Judgment entered on April 13, 1973.

(c) At the time of the exchange referred to in paragraph 2 (b) above, Respondent will make available for delivery to Petitioner the tangible personal property located in 102 Canterbury Lane, Palm Beach, Florida, which belongs to him. All other, furniture, furnishings and objects of art are and shall remain the property of the Respondent.

(d) The Respondent shall have the exclusive possession of the property at 102 Canterbury Lane, Palm Beach, Florida, pending the transfer referred to in paragraph 2 (b) above, and thereafter, and shall pay the maintenance and utilities thereon.

(e) The Petitioner shall be responsible for, and shall pay, the delinquent real estate taxes of the Town and County of Palm Beach, Florida, on 102 Canterbury Lane, Palm Beach, Florida, for the calendar years 1971 and 1972.

(f) Respondent will execute and file with Petitioner joint federal income tax returns for all calendar years for

which they are authorized to file such returns under the Internal Revenue Code and the applicable Regulations. In connection with the preparation of such returns, Respondent has furnished to Petitioner copies of her federal income tax returns for the calendar years 1968 through 1971 and will furnish copies of her other such returns which are applicable to the calendar years still open as aforesaid. Petitioner will be responsible for the preparation of the returns, and they will be submitted to Respondent, who will then have a reasonable time—not to exceed ten (10) days—to examine the return. Respondent does not, and will not, claim, merely by reason of agreeing to execute and file such returns, any share of refunds accruing by reason of the filing of the returns. However, to the extent that the refunds are applicable to Respondent's own income or deductions, she will receive an equitable adjustment. Petitioner and Respondent each do hereby represent to the other that his or her respective income and deductions which will be reported on the aforesaid joint federal income tax returns will be true and correct, and Petitioner and Respondent agree that any deficiencies resulting from a subsequent audit shall be paid by the one whose incorrect statement of income or deductions caused the deficiency.

(g) Each of the parties shall be responsible for his or her own attorney's fees and costs incurred in the dissolution of marriage proceedings and property settlement.

(h) The exchange of the $206,000.00 for the deed to 102 Canterbury Lane, Palm Beach, Florida, as provided in paragraph 2 (b) above, the delivery of the tangible personal property as provided in paragrah 2 (c) above, the payment of the real property taxes as provided in paragraph 2 (e) above, and the delivery of the copies of

federal income tax returns as provided in paragraph 2 (f) above, shall all take place contemporaneously at 11:00 A.M. on Thursday, June 7, 1973, or at such earlier date and time as the parties may agree in writing.

3. The Court may enter an amended Final Judgment incorporating the provisions set forth in subparagraphs (a) through (h), inclusive, of paragraph 2 above and retaining jurisdiction to enter such further orders as are necessary and proper, including, without limitation, such orders as may be necessary to assure that the provisions of such amended Final Judgment are carried out.

Dated this 31st day of May, 1973.

_____

Petitioner

_____

Respondent

_____

Frederick H. Hope

Attorney for Petitioner
400 Royal Palm Way
Palm Beach, Florida 33480

SALES, METZGER & CHRISTIANSEN
249 Royal Palm Way
Palm Beach, Florida 33480

and

ALLEY, MAASS, ROGERS, LINDSAY & CHAUNCEY

321 Royal Poinciana Plaza South
Palm Beach, Florida 33480

By_____

APPENDIX B

AFFIDAVIT

State of Florida
County of Palm Beach

PERSONALLY APPEARED BEFORE ME, the undersigned officer, JOHN B. DUNKLE, Clerk of the Circuit Court, after first being duly sworn, deposes and states:

THAT on Thursday, May 31, 1973, at 4:37 p.m., a Stipulation pertaining to agreements made between Edward B. McLean and Manuela H. McLean to amend the Final Judgement on the dissolution of their marriage was filed in the office of Clerk of the Circuit Court of the 15th Judicial Circuit of Florida in and for Palm Beach County regarding case #71C-4077, before Hugh MacMillan, Circuit Judge.

THAT the Stipulation states that Manuela H. McLean will execute and file with Edward B. McLean joint federal income tax returns for all calendar years for which they are authorized to file such returns under the Internal Revenue Code and the applicable Regulations. In connection with the preparation of such returns, Manuela H. McLean has furnished to Edward B. McLean copies of her federal income tax returns for the calendar years 1968 through 1971 and will furnish copies of her other such returns which are applicable to the calendar years still open as aforesaid.

That the Amended Final Judgement, under normal and ordinary procedures, would not have been made available for public viewing in the Official Records before June 4, 1973.

THAT this Stipulation document was not recorded into the Official Records of Palm Beach County.

THAT in accordance with our normal procedure, this Stipulation would not appear in the case file until June 4, 1974, for reason it normally takes two full working days from date of filing to process.

JOHN B. DUNKLE

Clerk of the Circuit Court
15th Judicial Circuit

SWORN to and subscribed before me this 17th day of September, 1973.

NOTARY PUBLIC

APPENDIX C

AFFIDAVIT

William J. Beiswanger, Esquire
104 North County Road
P. O. Box 746 (832-6357)
Palm Beach, Florida 33480

STATE OF FLORIDA
COUNTY OF PALM BEACH

I, WILLIAM J. BEISWANGER, hereby swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

1. That, on or about August 18, 1973, I did converse by telephone with one FREDERICK H. HOPE, attorney for EDWARD B. McLEAN, and he did inform me:

(a) that on May 31, 1973, Edward B. and Manuela McLean had filed an agreement with the Circuit Court for Palm Beach County;

(b) that this agreement contained a provision that taxpayers would file joint returns for all eligible years and that Manuela McLean would furnish copies of her return for 1968;

(c) that subsequent to trial of Defendant, pursuant to this agreement, he did instruct J. W. Perry, taxpayer's accountant, to prepare a joint return for Edward and Manuela McLean based on data appearing on the amended 1968 joint return prepared and filed by Defendant;

(d) that they intend to file same with the Internal Revenue Service.

2. That, on or about August 21, 1973, I did personally converse by telephone with J. W. Perry pertaining to preparation of the 1968 joint return herein referred to and that he did inform me:

(a) that in the beginning of July, 1973, he was instructed by Frederick H. Hope to prepare a 1968 joint return for Edward and Manuela McLean;

(b) that he did prepare this return and forwarded it to Frederick H. Hope for taxpayer's signature;

(c) that this return was based on the 1968 amended joint return prepared by Defendant and did not differ from it as to any material fact;

(d) that Frederick H. Hope did obtain Edward McLean's signature and was then forwarded to J. W. Perry to obtain Manuel McLean's signature and filing.

WILLIAM J. BEISWANGER

SWORN to and subscribed before me this 25 day of September, 1973.

NOTARY PUBLIC

APPENDIX D

Polygraph Testing Division
321 Northlake Boulevard
North Palm Beach, Fla.

To: Mr. William J. Beiswanger
Attorney representing
Mr. Paul C. WASHBURN

ISSUE: Specific Inquiry regarding circumstances of conviction of Mr. WASHBURN.

Name (Last, First, Middle)	Age	Sex	Job Title	DOB	SSAN	Date Examined
				11-5	013-14	Aug. 28, 1973
WASHBURN, Paul Codding	54	M	Self-Empl	1918	7536	Sept. 14, 1973

During the interview preceding the examination Mr. WASHBURN volunteered the following information:

On August 24, 1973, Mr. William J. Beiswanger and Mr. Paul C. WASHBURN appeared in my offices and several hours of discussion, regarding the circumstances of the indictment, trial and conviction of Mr. WASHBURN for violation of U.S. Tax laws took place.

Mr. WASHBURN asserted that when HE filed the Joint (Original) 1968 tax return for E. B. & Manuela McLean, in May 1969, HE did so at the instruction of the taxpayer and his agent, attorney Sidney Friedman, and HE filed said return with no fraudulent intent. HE further stated that HE later prepared and filed an Amended tax return for E. B. & Manuela McLean (Filed in January 1971) in good faith at the request of the client Taxpayer, and that when this return was filed HE did so without any fraudulent intent or knowledge that any crime would be committed by its filing.

Mr. WASHBURN consented to submit to a series of Polygraph examinations to determine the truthfulness of Mr. WASHBURN'S statements regarding the circumstances of the filing of the above mentioned tax returns. Mr. WASHBURN was examined on two subsequent occasions, August 28, 1973 & September 14, 1973, by a professionally certified American Polygraph Association member, licensed under state laws to conduct such examinations in Florida, Georgia, Virginia and Mississippi. The instrumentation utilized for the examination is the most modern and sophisticated four (4) channel Polygraph available manufactured by C. H. Stoelting, Chicago, Illinois. It is calibrated for tolerance at regular intervals and is capable of measuring and recording two (2) Res-

piratory, Electro-Galvanic, and Cardiovascular responses. It exceeds all state requirements for instrumentation capability, Mr. WASHBURN'S Polygraph records are available for review.

EXAMINATION DESIGN AND FORMULATION:

Both examinations conducted on Mr. WASHBURN were Integrated Control examinations utilizing the most modern and scientific techniques in the profession. The Relevant questions used during the examinations, Mr. WASHBURN'S responses and the examiners conclusions are stated below.

AUGUST 28, 1973, Relevant questions, (1968 Original Joint tax return)

Q. Did Sidney Friedman, on or about April 15, 1969, tell you that it was okay for you to file a joint tax return for E. B. & Manuela McLean for 1968 because he was sending the proper Power of Attorney to do so? ANSWER: YES

Q. When you filed the original 1968 Joint tax return for E. B. & Manuela McLean did you feel its filing represented any crime? ANSWER: NO

CONCLUSION: It is my opinion based on evaluation of the Physiological responses displayed by Mr. WASHBURN to the above questions that HE was truthful in HIS answers to those questions.

SEPTEMBER 14, 1973, Relevant questions, (Amended 1968 Joint tax return)

Q. Did the filing of the amended Joint tax return for 1968 for the McLeans constitute in your mind any crime?

ANSWER: NO

Q. When the amended 1968 Joint tax return for E. B. & Manuela McLean was filed in January, 1971, did its filing in your mind cause any law to be violated? ANSWER: NO

Q. Did you intentionally attempt to violate any U. S. Tax laws in the filing of the amended Joint tax return for 1968 for E. B. & Manuela McLean?

ANSWER: NO

CONCLUSION: It is my opinion based on evaluation of the Physiological responses displayed by Mr. WASHBURN to the above questions that HE was truthful in HIS answers to those questions. It is further my opinion that Mr. WASHBURN did not attempt to perpetrate a fraud or have any intention of violating any law as it applied to the filing of either the original or the amended 1968 tax returns for E. B. & Manuela McLean. The Polygraph records of Mr. WASHBURN and the test construction mtaerials used are available for independent review by any certified Polygraph examiner of the American Polygraph Association upon request.

John H. Tiffany, Jr.
Florida License 69-P

END OF REPORT

APPENDIX E

EXCERPTS FROM THE CODE AND REGULATIONS TO THE INTERNAL REVENUE CODE

1.6013-1(a) In general

(1) . . . for any taxable year with respect to which a joint return has been filed, separate return shall not be made by the spouses after the time for filing the return of either has expired . . .

(2) A joint return of a husband and a wife (if not made by an agent *of one or both spouses*) shall be signed by both spouses. The provisions of paragraph (a)(5) of Sec. 1.6012-1, relating to returns made by agents, shall apply where one spouse signs a return as agent for the other, or where a third party signs a return as agent for *one or* both spouses.

(Matters italicized added by T D 7274.)

APPENDIX F

AFFIDAVIT

Paul C. Washburn
251 Royal Palm Way
Phone: 655-5777
Palm Beach, Florida 33480

STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

I, PAUL C. WASHBURN, Defendant in the action styled United States of America v. Paul C. Washburn, hereby swear under penalty of perjury that the foregoing information is true and correct to the best of my knowledge and belief.

1. That, neither on or before June 4, 1973, nor at any time during my defense of the above styled action, did I have knowledge of or have reason to believe that Edward B. and Manuela McLean had entered into a Stipulation between themselves whereby they would file joint income tax returns.

2. That, neither on or before June 4, 1973, nor at any time during my defense of the above styled action, did I have actual knowledge that the attorney and accountant for Edward B. McLean were going to prepare an amended 1968 joint income tax return for Edward B. and Manuela McLean, pursuant to the above agreement, based upon the amended 1968 joint return that I had prepared for the taxpayers for which I have been found guilty of the commission of a crime under Federal Statute 26 USCA Sec. 7206(2).

3. That, I first became aware of the above facts when on or about August 21, 1973, my attorney, William J. Beiswanger, did inquire of me whether I had knowledge of same to which I replied in the negative.

PAUL C. WASHBURN

SWORN to and subscribed before me
this *25th* day of September, 1973

NOTARY PUBLIC

APPENDIX IV

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 73-143-CR-CF

UNITED STATES OF AMERICA,

v.

PAUL C. WASHBURN.

ORDER

Paul C. Washburn has filed motions for new trial and judgment of acquittal and to stay execution of the mandate from the Court of Appeals affirming Washburn's conviction.

FACTS

Washburn, a tax consultant, was convicted in a jury trial of violating 26 U.S.C. 7206(a) by preparing and presenting a fraudulent income tax return for one of his clients, Edward McLean. Specifically, the indictment charged Washburn with preparing a fraudulent amended joint return for the tax year 1968 for Edward and Manuela McLean, at a time when Washburn knew Edward McLean was estranged from his wife and not entitled to file a joint return. Washburn was also charged with signing the amended return for Manuela McLean pursuant to a claimed power of attorney which he in fact did not have.

Washburn is now urging this Court to set the conviction aside because of "newly discovered evidence." This

evidence is in the form of a written stipulation between Edward and Manuela McLean, incident to divorce, whereby the wife agreed to the filing of joint amended returns for all "open years," including 1968. The stpulation is dated May 31, 1973.

NEWLY DISCOVERED EVIDENCE

The cases in this Circuit are uniform as to the requirements for granting a new trial on the basis of newly discovered evidence.

> In order to justify a new trial, the rule is that the evidence must in fact be newly discovered and that the movant must have exercised due diligence in discovering the evidence. It must not be merely cumulative or impeaching. Furthermore, the new evidence must be material and be such that it would probably produce an acquittal in a new trial.

United States v. Jacquillon, 469 F.2d 380 (5th Cir. 1972); See also *United States v. Littlepage,* 465 F.2d 63 (5th Cir. 1972); *United States v. 41 Cases, More or Less,* 420 F.2d 1126 (5th Cir. 1970); *Nagel v. United States,* 354 F.2d 441 (5th Cir. 1966).

Applying these criteria to Washburn's "newly discovered evidence", it is apparent that the evidence is totally insufficient to justify a new trial. The stipulation is immaterial to Washburn's conviction. It was entered into more than two years after Washburn prepared and filed the fraudulent return. The fact that the McLeans subsequenly agreed to file a joint return does not make the earlier joint return prepared by Washburn any less fraudulent.

The only other conceivable use for the "newly discovered" stipulation would be for the purpose of proving that the return prepared and presented by Washburn was with the consent of Manuela McLean. However, the evidence adduced at trial is contra and the sufficiency of the evidence on the issue of consent was upheld on appeal. *United States v. Paul C. Washburn,* Slip Opinion #73-2818 (5th Cir. December 12, 1973). Also, as discussed above, an attempt to impeach or collaterally attack evidence presented at trial is impermissible under the newly discovered evidence rule. Fed. R. Crim. P. 33. Thereupon, it is

ORDERED and ADJUDGED as follows:

(1) Defendant Washburn's motion for a new trial and judgment of acquittal be and the same is hereby denied;

(2) the motion to stay execution of the mandate be and the same is hereby denied.

DONE and ORDERED at Miami, Florida, this 14 day of February, 1974.

_____

Chief Judge

cc: U. S. Attorney
U. S. Marshal
Chief Probation Officer
William J. Beiswanger, Esq.
Paul C. Washburn

APPENDIX V

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-1516
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PAUL C. WASHBURN,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(August 20, 1974)

Before
WISDOM, GOLDBERG, and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5th Cir., *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York*, et al, 5th Cir., 1970, 431 F.2d 409, Part I.

1. See *N.L.R.B. v. Amalgamated Clothing Workers of America*, 5th Cir., 1970, 430 F.2d 966.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-301

PAUL C. WASHBURN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of a five-count indictment charging willful preparation of a false income tax return, in violation of 26 U.S.C. 7206(2). The indictment alleged that in January 1971 petitioner had willfully and knowingly aided and assisted in the preparation of an amended income tax return for Edward B. McLean for the calendar year 1968, which was false and fraudulent in that it showed the filing status of McLean to be "married filing joint return," when petitioner knew that McLean was not entitled to that filing status nor to the tax benefit resulting from a joint return (Pet. App. I-3 to I-4). The court imposed a fine of $2,500 and an 18-month sentence of imprisonment, of which 60 days was to be served and the balance suspended, with petitioner placed on probation for two years. The court of appeals affirmed the conviction in a brief *per curiam* opinion. It stated (488 F. 2d 139):

> Washburn not only prepared a joint return in 1968 for his client, who was estranged from his wife, when the wife had specifically rejected the idea of jointly filing and, indeed, filed a separate return instead, but Washburn also signed the wife's name to the return pursuant to a claimed power of attorney which he in fact did not have. In the return, certain of the wife's losses were claimed against the husband-client's income.
>
> Washburn contends that the Government's evidence was insufficient to sustain the verdict. We disagree. Viewed in the light most favorable to the Government, *Glasser* v. *United States*, 1942, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, there was abundant evidence to support the verdict.

No petition for certiorari was filed with respect to this judgment. However, while the case was pending in the court of appeals, petitioner filed in the district court a motion for acquittal and for a new trial on the ground of newly discovered evidence. He alleged that, contrary to their trial testimony, Mr. and Mrs. McLean had agreed in writing several days before the trial in 1973 that they would file joint income tax returns for all open years, including 1968 (Pet. App. II-1 to II-5). The district court denied both motions on February 14, 1974 (Pet. App. IV-1 to IV-3), and the court of appeals affirmed without opinion (Pet. App. V-1). The petition for certiorari seeks review of this judgment affirming the district court's denial of the motions for acquittal and a new trial.

1. Petitioner first contends (Pet. 8-12) that the district court's denial of his motion for a new trial and for judgment of acquittal was predicated upon a misconception of the law relating to the requirements for joint

filing of income tax returns.[1] He urges the district court erroneously held the so-called newly discovered evidence (the 1973 agreement to file joint returns for all open years) to be immaterial because of the misapprehension that the McLeans were barred from filing a joint 1968 return merely because they were not living together at the time the return was filed. There was, however, no such misapprehension by the district court. Petitioner invokes the following statement of the district court in denying his motion for new trial and for judgment of acquittal (Pet. App. IV-1):

> Specifically, the indictment charged Washburn with preparing a fraudulent amended joint return for the tax year 1968 for Edward and Manuela McLean, at a time when Washburn knew Edward McLean was estranged from his wife and not entitled to file a joint return.

The quoted language is taken from the court's finding of facts and is merely an attempt to set forth the charge against petitioner. However, that statement cannot reasonably be construed to be a legal conclusion of the trial judge. That the district court was well aware of the rules of law petitioner claims to have been misapprehended is apparent from the court's instructions to the jury, which were in full agreement with petitioner's view of the law.[2]

---

[1]Petitioner cannot now challenge the sufficiency of proof at trial. The judgment of the court of appeals (488 F. 2d 139) on that question is *res judicata*, no petition for a writ of certiorari having been filed. *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66, 75-78; *Rankin* v. *Florida*, 418 F. 2d 482 (C.A. 5).

[2]The court stated as follows (Tr. 393):

> In this case, the Government does not dispute the fact that the McLeans were married at the end of the 1968 tax year and were, therefore, entitled to file a joint tax return if they so elected to do so.
>
> In determining whether or not the amended 1968 joint return is false as to material matter, the question that you must resolve is whether or not Manuela H. McLean gave her consent to file such a joint return.

Similarly, contrary to petitioner's contention (Pet. 9-12), the district court's statement that "the fact that the McLeans subsequently agreed to file a joint return does not make the earlier joint return prepared by Washburn any less fraudulent" (Pet. App. IV-2) does not establish that the court believed that a husband and wife may not elect to file joint returns after previously having filed separately. Even if the McLeans had the right subsequently to file a joint return,[3] an agreement to do so long after the criminal act at issue occurred has no bearing upon petitioner's state of mind at the time he prepared the return in question. Cf. *Willingham* v. *United States*, 289 F. 2d 283 (C.A. 5). Indeed, petitioner himself recognizes that the subsequent agreement has nothing to do with the question of whether or not the return prepared by him was fraudulent; he states (Pet. 10) that "[t]he act of subsequent agreeing to file joint returns pertains to Husband and Wife. Their action does not go to the question of Petitioner's fraud."

2. Petitioner also urges (Pet. 13-16) that the district court erred in holding the so-called newly discovered evidence to be immaterial because it was merely impeaching and because there was other evidence to sustain the conviction. But the district court did not conclude that the subsequent agreement between the McLeans

---

[3]In fact, they had no such right. Section 6013(b)(2) of the Internal Revenue Code of 1954 provides that married taxpayers may not file amended joint returns after one spouse has filed separately (as Mrs. McLean had here) unless the amended joint returns are filed within three years from the time the original returns were required to be filed. Thus, the last day on which the McLeans could have filed an amended joint return for 1968 was April 15, 1972, more than a year before the signing of the agreement relied upon by petitioner.

was immaterial on the ground that there was other evidence sufficient to sustain the conviction (see Pet. App. IV). Noting that the sufficiency of the evidence on the issue of the wife's lack of consent was upheld on appeal, the district court held that if the intended use of the so-called newly discovered evidence was to establish that Mrs. McLean had consented to the joint return prepared and presented by petitioner, the evidence at trial was contrary to this conclusion.

There is no doubt that is the so-called newly discovered evidence established that either or both of the McLeans were lying on the crucial issue of consent at the time petitioner prepared the return in question, petitioner would be entitled to a new trial. See *Mesarosh* v. *United States*, 352 U.S. 1. But in view of the court's undisputed finding that the alleged agreement was reached by the McLeans more than two years after the fraudulent return had been filed and could not therefore have affected the falsity of the return, it is plain that Mrs. McLean's trial testimony that she had not consented to the joint return prepared by petitioner was not false.

Since the district court correctly concluded that the agreement did not establish that Mrs. McLean's trial testimony was untruthful,[4] the so-called newly discovered evidence was, at best, impeaching and did not justify a new trial. *United States* v. *Jacquillon*, 469 F. 2d 380, 388 (C.A. 5).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK.
Solicitor General.

DECEMBER 1974.

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[4]Such finding is entitled to the greatest deference by the appellate courts. *United States* v. *Johnson*, 327 U.S. 106.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-301

PAUL C. WASHBURN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

William J. Beiswanger
COLLIER & BEISWANGER
P. O. Box 746
Palm Beach, Florida 33480

Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-301

PAUL C. WASHBURN,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner takes this opportunity to take issue with points raised in Respondent's Memorandum in Opposition. The alleged crime consisted of filing a joint return for Edward and Manuela McLean, married taxpayers, under power of attorney executed by Edward McLean alone. Petitioner filed two returns, the original 1968 joint return in May, 1969 and the amended 1968 joint return in January, 1971. Both returns were identical except that the amended return included the wife's tax information

previously omitted and, therefore, the amended return is the more correct return. Petitioner was indicted on both the original and amended returns. The district court dismissed the indictment as to the original. The jury convicted Petitioner on the amended return.

Petitioner's motion for new trial and judgment of acquittal (Pet. App. III, 2-13) pointed out that although Edward and Manuela McLean testified at trial that Mrs. McLean did not sign nor consent to the returns; in fact she gave her tacit consent thereto through her awareness of their existences and by participating in preparation thereof. Furthermore, Petitioner showed that Mrs. McLean always consented to sign the returns providing she receive the tax savings in advance from her husband but such condition must be ignored. (Pet. App. III, 8-9). Likewise, Petitioner pointed out that Government witnesses testified that he indicated to them that Mrs. McLean intended to sign the returns and, therefore, expressed her acquiescence thereto. (Pet. App. III, 18). Finally, Petitioner's motion for new trial avers that the grounds for new trial was a newly discovered formal consent to file joint returns including 1968 which was executed by both Edward and Manuela McLean and this agreement (1) directly contradicted their testimony at trial and (2) was relevant and material evidence that such consent was in fact given and should have been presented to the jury.

In response to these allegations, Respondent states that the revelation of this agreement between taxpayers which showed their testimony concerning Mrs. McLean's consent to be false is nevertheless immaterial in that an agreement executed subsequent to the act does not negate

an earlier fraud. *Willingham v. United States*, 289 F. 2d 283 (CA 5, 1961). (Resp., 4). This same reasoning was also propounded by the district court. *Willingham* is distinguishable from this case at bar. Taxpayer in *Willingham* in defense to his criminal fraud of taking false deductions showed that he incurred a net operating loss in a subsequent year which when carried back to the year in question eliminated taxable income and tax and, therefore, no crime had been committed. The Court of Appeals rejected this defense stating that the criminal intent or mens rea existed in the year the act was completed, and such intent is not negated by such a fortuitous event. An issue at trial in the case before us is whether or not Mrs. McLean gave her consent to the amended joint return. (Pet., 13). Government witnesses testified that Petitioner told them that she consented to the return and would sign it. (Pet. App. III, 20-22). The consent is further evidenced by the agreement. Execution of the agreement is not a fortuitous, unrelated event as in *Willingham* but goes directly to the very issue at trial, namely, consent. *Willingham* is further distinguished in that there is no allegation that taxpayer was convicted on false testimony.

Assuming arguendo, that Mrs. McLean did not consent but Petitioner believed she had consented or he otherwise had authority to file, the criminal intent is lacking and no crime has been committed. (Pet. App. III, 12-27). The agreement whereby she gave her formal consent to file returns for 1968 is crucial evidence to be presented to the jury on the question of Petitioner's state of mind. If direct evidence was presented that it was Petitioner's understanding that Mrs. McLean would sign the return and at the time this testimony was being presented before the

jury a formal agreement was executed by and between Mrs. McLean whereby she did agree to file joint returns; again this is not an unrelated fortuitous event. This agreement directly relates back and bears on Petitioner's state of mind or mens rea at the time of the alleged fraud.

Respondent argues that the McLeans had no right to file an amended joint return for 1968 since such return must be filed by April 15, 1972 and the agreement was executed more than one year after this date. (Resp. 4 fn. 3). In reply Petitioner points out that the amended 1968 return was filed on January 18, 1971 or three months prior to the deadline, and Petitioner asserts that Mrs. McLean gave her tacit consent thereto prior to the execution of the agreement. (Pet. App. III, 1-12). The newly discovered agreement is further evidence that tacit consent was given by Mrs. McLean at the outset, and that Petitioner was correct when he stated to Government witnesses that Mrs. McLean intended to sign the return and thus consented thereto.

Subsequent to this agreement Petitioner learned that an identical 1968 return with Mrs. McLean's signature attached thereto was filed before the Internal Revenue Service, further evidence that Mrs. McLean intended from the outset to file jointly. A copy of Petitioner's motion to produce this evidence is appended to this Reply.

Respondent also takes issue with Petitioner's assertion that the district court's conclusion of immaterially was based on an error of law, namely, that Petitioner knew at the time of filing that the McLeans were estranged and not entitled to file a joint return. (Resp., 3). In support for this contention Respondent relies on information from

the transcript. Petitioner reiterates that the error appears in the Order of the district court and is the ground for ruling that the new evidence is immaterial; that the words in the Order are clear and unequivocal; and that if such legal premises were correct the district court's conclusion predicated upon this premise would be correct. (Pet. App. IV). The district court's Order also makes a finding as to Petitioner's state of mind at the time of the act, but no evidence was proffered at trial to show that Petitioner was aware that the McLeans were not eligible to file jointly because they were estranged.

Respondent alleges that the Order says that ". . . if the intended use of the so called newly discovered evidence was to establish that Mrs. McLean had consented to the joint return prepared and presented by Petitioner, the evidence at trial was contrary to this conclusion." (Resp., 5). Respondent admits that the district court found that the agreement was immaterial because there was other evidence to sustain the verdict. However, the trial judge is not the proper person to make this determination. The role of the jury is to assume this responsibility, but the jury at this juncture can no longer act and a new trial must be ordered. *Mesarosh v. United States*, 77 S. Ct. 1 (1956).

Respondent then concludes by admitting that if the McLeans lied at trial on the crucial issue of Mrs. McLean's consent, Petitioner would be entitled to a new trial. However, Respondent finds that Mrs. McLean's testimony was truthful because the district court found that the subsequent agreement could not have affected the falsity of the return prepared by Petitioner. (Resp., 5). The logic of this reasoning is wanting. It is incredible to

believe that lies by witnesses under oath at trial are negated on the ground that the new evidence (agreement), which reveals the falsity of the testimony, is immaterial because the agreement was executed two years after the alleged fraudulent return was prepared. The issue before this Court is not whether the agreement validates the 1968 amended return. This is a civil question. The criminal issue is whether or not Mrs. McLean gave her tacit consent to the return and whether or not Petitioner believed he had authority to prepare and file it. Mr. and Mrs. McLean testified at trial that Mrs. McLean never agreed to terms under which they would file jointly. (Transcript 34, 68). The jury then had reason to believe that at no time did they agree to file joint returns. The agreement is in direct contradiction to this testimony and reasonable men could believe such testimony to be false.

The conclusion that an agreement executed more than two years after the return was filed cures false testimony is totally illogical. Is testimony determined to be true or false upon the happening or chance of an event or in this case when the agreement occurred? If the agreement were executed only a year or perhaps six months after filing the return then is Petitioner entitled to a new trial because the shorter time period now shows the testimony to be false? This is what Respondent suggests in his Memorandum. However, this Court rightfully holds that if the false testimony is in any way relevant to the case or could in any reasonable likelihood have affected the judgment of the jury the appeals court has the duty to correct the falsity and order a new trial, *Napue v. Illinois*, 78 S.Ct. 1173 (1958). *Giglio v. United States*, 92 S. Ct. 763 (1972). Therefore, since the new evidence reveals that false

testimony was given at trial, such new evidence is not merely impeaching.

For reasons herein stated and previously stated in the petition for a writ of certiorari, this Court should grant certiorari.

Respectfully submitted,

William J. Beiswanger
Attorney for Petitioner
104 North County Road
P.O. Box 746 (832-6357)
Palm Beach, Florida 33480

PROOF OF SERVICE — AFFIDAVIT

I, WILLIAM J. BEISWANGER, attorney of record for Paul C. Washburn, Petitioner, herein depose and say that I served by mail three copies of Petitioner's Reply to the Supreme Court of the United States upon the Solicitor General, Department of Justice, Washington, D.C. 20530. Respondent herein.

/s/ WILLIAM J. BEISWANGER
William J. Beiswanger
Attorney for Petitioner
104 North County Road
P.O. Box 746 (832-6357)
Palm Beach, Florida 33480

SWORN to and subscribed before me this 27 day of December.

/s/ CARL M. COLLIER
NOTARY PUBLIC,
State of Florida at Large

My Commission Expires:
May 5, 1978
(SEAL)

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,
Plaintiff,

versus No. 73-143-CR-CF

PAUL C. WASHBURN,
Defendant.

MOTION FOR PRODUCTION OF DOCUMENTS

1. Defendant, PAUL C. WASHBURN, hereby asks this Court, pursuant to Rule 16, Federal Rules of Criminal Procedure, to permit Defendant to inspect and copy all joint income tax returns filed with the Internal Revenue Service and signed by both Edward B. McLean and Manuela H. McLean, electing the filing status of married filing jointly, for all years beginning with and including 1968, 1969, 1970, 1971, 1972, 1973.

2. These documents pertain to the following matter.

(a) Defendant, Paul C. Washburn, was indicated and convicted of violating 26 USC 7206(2) in that he allegedly prepared an amended joint income tax return for the year 1968 for Edward B. McLean and Manuela H. McLean, electing the status of married, filing jointly, under power of attorney executed by Edward B. McLean alone.

(b) Since Mrs. McLean did not sign either the return nor a power of attorney the issue was whether or not Mrs. McLean gave her consent to this return. Transcript of Testimony, page 393.

(c) Both Mr. McLean and Mrs. McLean testified at trial that she did not consent to this return. Transcript of Testimony, pages 34, 67, 69, 70, 75.

(d) The case was appealed to and affirmed by the Court of Appeals. *United States v. Paul C. Washburn* (CA5, 1973) 488 F.2d. 132.

(e) Defendant filed a Motion for New Trial and Judgment of Acquittal on the grounds of newly discovered evidence. The newly discovered evidence consisted of an agreement between Mr. and Mrs. McLean to file joint income tax returns for all open years, including the year 1968. Since this agreement was executed at the time Mr. and Mrs. McLean testified that she had not given her consent, Defendant alleged that their testimony misled the jury. The new evidence was so material that it would have probably produced a different verdict if presented to them.

(f) This Court denied Petitioner's motion of February 14, 1974, and the Court of Appeals affirmed on August 20, 1974.

(g) It has now come to the attention of Defendant that, in addition to the agreement to file jointly, both Mr. and Mrs. McLean have signed and filed joint income tax returns for 1968 and subsequent years.

(h) Defendant alleges that this is new and material evidence which goes directly to the question of consent of Mrs. McLean; that if, in addition to the agreement to file jointly, these returns were presented to a jury in all likelihood the jury would reach a different verdict.

3. These documents are not otherwise procurable by Defendant in that they were voluntarily given by Mr. and Mrs. McLean to the Internal Revenue Service subsequent to trial, and are not available to others.

4. Defendant can not properly prepare his Motion for New Trial without this new evidence.

5. This application is made in good faith and is not an attempt to obtain information generally.

6. Authority for Defendant's motion lies in the decisions of the United States Supreme Court and in the Court of Appeals for the Second Circuit. The Constitutional basis for disclosure lies in the right to a fair trial by due process under the Fifth and Fourteenth Amendments. Defendant has the right to be protected against the suppression of exculpatory evidence even in absence of demand to or bad faith on part of the prosecutor. Disclosure of all material under Rule 16, Federal Rules of Criminal Procedure promotes the proper administrator of justice. *Napue v. Illinois*, 79 S.Ct. 1193 (1958); *United States v. Keogh*, 391 F.2d. 146 (C.A.2); *Brady v. Maryland*, 83 S.Ct. 1194 (1963); *Dennis v. United States*, 86 S.Ct. 1840 (1966).

WHEREFORE, in consideration of the premises, Defendant requests this Court to order Plaintiff to produce and deliver to Defendant those documents requested in this motion.

/s/ WILLIAM J. BEISWANGER
WILLIAM J. BEISWANGER
Attorney for Defendant
104 North County Road
P. O. Box 746 (832-6357)
Palm Beach, Florida 33480

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion has been furnished by mail to Max Wheeler, Attorney, Tax Division, Department of Justice, Washington, D.C. 20530 this 12th day of September, 1974.

/s/ WILLIAM J. BEISWANGER
WILLIAM J. BEISWANGER
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SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-301

PAUL C. WASHBURN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR REHEARING ON DENIAL OF PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-301

PAUL C. WASHBURN,
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UNITED STATES OF AMERICA,
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Petitioner's petition for rehearing is based on certain factors this Court may have overlooked in review of his case.

Petitioner filed a motion for new trial to his conviction of tax fraud on the grounds that his conviction was predicated upon false testimony given at trial by two witnesses, Edward B. and Manuela H. McLean (taxpayers). The issue at trial was whether or not Mrs.

McLean consented to file an amended joint return for 1968. Although Mrs. McLean did not sign the alleged fraudulent return nor the power of attorney authorizing Petitioner to file the joint return on her behalf, if she otherwise had consented to the return, Petitioner has committed no crime. (Transcript 393, 394).

The district court's Order, denying Petitioner's motion for new trial, stated that the new evidence was immaterial to the conviction as the agreement to file jointly was entered into more than two years after the preparation of the alleged fraudulent return. (Appendix IV-1). The Solicitor General's memorandum in opposition to Petitioner's petition for writ of certiorari stated that the district court concluded that Mrs. McLean's trial testimony was truthful. The Solicitor General admitted that if the McLeans were lying at trial, Petitioner would be entitled to a new trial. (Resp. 5). However, the Solicitor General's statement that the district court correctly concluded that Mrs. McLean's trial testimony was not false is in itself incorrect. The district court does not conclude that Mrs. McLean was telling the truth at trial but merely that the new evidence is immaterial! Thus, the premise upon which the Solicitor General promulgated his opposition is contrary to fact.

The lies upon which Petitioner was convicted were patent. Mrs. McLean refers to the property settlement agreement (newly discovered evidence to file jointly) when she stated that she bought her house from her husband. (Transcript 73, 74). The newly discovered evidence included the provision whereby Mrs. McLean agreed to pay Mr. McLean $206,000 for the

home formerly owned by both. (Appendix III-29). Petitioner's trial attorney then asked Mrs. McLean if she had ever received a letter from her husband outlining the conditions whereby they would file jointly and she answered, "No". (Transcript 74). He then asked her if it wasn't true that she and her husband were entitled to file jointly for 1968, and she replied: "No, we never came to that agreement." (Transcript 75). Petitioner's trial attorney asked her if she had ". . . ever talked to *anyone* concerning filing *at this time* for 1968 with her former husband . . .". (Transcript 77). Mrs. McLean replied: "I don't think there would be any reason to discuss it." (Transcript, 77). The district court then instructed Petitioner's attorney to go on to a new subject. (Transcript, 78)

Paragraph (f) of the newly discovered evidence contains the agreement whereby Mr. and Mrs. McLean would file joint returns for years 1968 through 1971. (Appendix III-29). Did Mrs. McLean make a distinction between receiving a letter from her husband to file jointly from receiving an agreement from her husband to file jointly? Did Mrs. McLean testify that she knew of that part of the agreement which provided that she was to buy the house from her husband for $206,000 but she knew nothing of that part of the agreement providing for filing joint returns? (Her signature is affixed to the entire agreement). Did Mrs. McLean not talk to anyone, even her own attorneys, about that part of the agreement to file joint returns? Did Mrs. McLean interpret the words "at this time" to mean some other time then the execution of the agreement even though the execution was but three days before trial? Was the trial court correct in instructing

Petitioner's attorney to go to another subject when he asked Mrs. McLean if she had ever received any correspondence on the matter of agreeing to file jointly? These untruthful utterances and deceptions on part of Mrs. McLean directly resulted in Petitioner's conviction of the crime of filing a false and fraudulent 1968 joint return in that the jury found that Mrs. McLean had not given her consent thereto. The jury is entitled to this additional evidence of consent showing Mrs. McLean's testimony was false.

The overwhelming evidence is that Mrs. McLean was not truthful when she testified she did not consent to file jointly. Is the district court correct in finding the agreement to file jointly immaterial when such evidence goes directly to the issue in question and established that testimony at trial on the issue is false? Has Petitioner received a fair trial and been accorded due process when his conviction has been based on false utterances? Has the Solicitor General acted responsibly by representing to this Court that the district court found that testimony given was true notwithstanding the district court made no such finding? Has this Court reversed its position that it is the function of the jury, not the trial court, to determine if there was sufficient evidence, other than that given by a false witness to sustain a conviction? Has this Court reversed its position that a lie, if anyway relevant to the case, must be corrected by the appellate courts?

WHEREFORE, in consideration of the premises, Petitioner prays that this Court will reconsider its

denial of Petitioner's petition for a writ of certiorari and grant Petitioner a new trial.

Respectfully submitted,

/s/ W. J. BEISWANGER
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PROOF OF SERVICE — AFFIDAVIT

I, WILLIAM J. BEISWANGER, attorney of record for Paul C. Washburn, Petitioner, herein deposes and say that I served by mail three copies of Petition for Rehearing to the Supreme Court of the United States upon the Solicitor General, Department of Justice, Washington, D.C. 20530. Respondent herein.

/s/ W. J. BEISWANGER
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SWORN to and subscribed before
me this 17th day of January, 1975.
/s/ CARL M. COLLIER
Notary Public, State of Florida at Large
My Commission Expires:
May 5, 1978